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ns taken and made in various Departments of the State, and to substitute
 elarations in lieu thereof, and for the more entire Suppression of volun- *Game.*
 y and extra-judicial Oaths and Affidavits; and to make other Provisions 30 & 31 Vict. c. 117.
 the Abolition of unnecessary Oaths."

Taken and received before me, one }
 of Her Majesty's Justices of the }
 Peace for the said County of }
 at in the said }
 County, this day of }
 18 . }

Game.

BY the 1 & 2 Will. 4, c. 32, a most material alteration of the game 1 & 2 Will. 4, c. 32.
 ws was effected; for, by this statute, it is no longer requisite that a
 erty should be qualified to kill game; and any person may kill it on
 king out a certificate for that purpose, subject to the law of trespass;
 ere are, however, certain restraints on tenants killing game on
 eir lands. Any one may now buy or sell game under certain restric-
 ons. Greater facility is given for the punishment of trespassers.
 ctions for penalties are put an end to. The offence of night poach-
 g remains as before the passing of this statute.

This subject may be conveniently arranged as follows:—

- I. *Repeal of Statutes by 1 & 2 Will. 4. c. 32, &c., p. 742, and Acts now in force.*
- II. *What shall be deemed Game, p. 742.*
- III. *Property in Game in General, p. 742.*
- IV. *Property in, and Laws as to Game in Franchised Places, p. 744.*
- V. *Property in, and Laws as to Game in Manors, Warrens, Decoys, Preserves, and Private Grounds, p. 748.*
- VI. *Who may kill or take Game. Penalty, &c. for killing it, &c., without being authorised, p. 753.*
- VII. *Gamekeepers, and herein of the Power to search for, seize, and kill Game, &c., p. 757.*
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- XII. *Soldiers Sporting, &c., p. 784.*
- XIII. *Recovery and application of Penalties, under the 1 & 2 Will. 4, c. 32.—Appeal.—Certiorari, p. 784.*
- XIV. *Protection of Persons acting in execution of 1 & 2 Will. 4, c. 32.—Limitation of Actions.—Tender of Amends, &c., p. 791.*
- XV. *Offence of Night Poaching, and going armed, &c., against 9 Geo. 4, c. 69, p. 791.*
- XVI. *Stealing, &c., of Deer, Destroying Park Palings, &c., Assaulting Keepers, &c., p. 800.*
- XVII. *Killing, &c., of Hares and Conies in Warrens, &c., p. 801.*
- XVIII. *Laws as to Swans, p. 805.*
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3. *Property in game in general.*

XX. *Laws as to Wild Ducks, Teal, Widgeons, &c.*, p. 806.

XXI. *Laws as to Noxious Birds or Animals*, p. 806.

1 & 2 Will. 4, c. 32.

XXII. *Forms, List of*, p. 807.

I. Repeal of Statutes by 1 & 2 Will. 4, c. 32, and Acts now in force.

The statute 1 & 2 Will. 4, c. 32, repealed 13 Ric. 2, st. 1, c. 13; 22 Edw. 4, c. 6; 11 Hen. 7, c. 17; 19 Hen. 7, c. 11; 14 & 15 Hen. 8, c. 11; 25 Hen. 8, c. 11; 33 Hen. 8, c. 6; 23 Eliz., c. 10; 2 Jac. 1, c. 27; 7 Jac. 1, c. 11; 22 & 23 Car. 2, c. 25; 4 W. & M. c. 23; 5 Ann. c. 14; 9 Ann. c. 25; 8 Geo. 1, c. 19; 10 Geo. 2, c. 32; 26 Geo. 2, c. 2; 28 Geo. 2, c. 12; 2 Geo. 3, c. 19; 13 Geo. 3, c. 55; 13 Geo. 3, c. 80; 39 Geo. 3, c. 34; 43 Geo. 3, c. 112; 48 Geo. 3, c. 93; 50 Geo. 3, c. 67; 58 Geo. 3, c. 75; 59 Geo. 3, c. 102.

The statutes now in force are—

- 9 Geo. 4, c. 96, ss. 1—9 (p. 792).
- 1 & 2 Will. 4, c. 32, s. 1 (p. 753); ss. 3, 4 (p. 768); s. 5 (p. 762); s. 6 (p. 744); ss. 7, 8 (p. 752); s. 9 (p. 744); ss. 10—12 (p. 752); ss. 13—16 (pp. 757, 758); ss. 17, 18 (p. 769); ss. 21, 22 (p. 770); s. 23 (p. 754); ss. 25—29 (pp. 770, 771); s. 30 (p. 773); s. 31 (p. 775); ss. 32—34 (p. 776); s. 35 (p. 777); ss. 36—38 (p. 788); s. 39 (p. 787); ss. 40—42 (p. 785); ss. 43—45 (p. 789); s. 46 (p. 777); s. 47 (p. 791).
- 5 & 6 Will. 4, c. 20, ss. 20, 21 (pp. 771, 788).
- 6 & 7 Will. 4, c. 65, s. 8 (p. 784).
- 2 & 3 Vict. c. 35, s. 4 (p. 770).
- 3 & 4 Vict. c. 24, s. 3 (p. 779).
- 4 & 5 Vict. c. 35, s. 82 (p. 749).
- 7 & 8 Vict. c. 29, s. 1 (p. 793).
- 11 & 12 Vict. c. 29, ss. 1—7 (p. 761).
- 23 & 24 Vict. c. 90, ss. 1—19 (p. 763).
- 24 & 25 Vict. c. 91, s. 17 (p. 767); c. 96, s. 12—17 (p. 800); s. 99 (p. 802); s. 103 (p. 802); s. 104 (p. 801); ss. 105—112 (p. 803); ss. 105—112 (p. 803); s. 120 (p. 805).
- 24 & 25 Vict. c. 100, s. 31 (p. 783).
- 25 & 26 Vict. c. 114, ss. 1—6 (p. 778).

II. What shall be deemed Game.

What deemed game.

By section 2 of the 1 & 2 Will. 4, c. 32, "The word 'game' shall for all the purposes of this act be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

See a similar enactment contained in the 9 Geo. 4, c. 69, s. 13.

As to woodcocks, snipes, quails, landrails, or rabbits, and the requisite certificate for sporting after the same, see *post*, p. 763.

III. Property in Game in General.

Property in game at common law.

Before we take notice of the provisions of the statute of 1 & 2 Will. 4, c. 32, made for the preservation of game, it may be requisite to observe how the common law stood herein; which depends upon the difference between *tame* and *wild* animals.

Tame animals.

The *tame* animals, such as *horses*, *cows*, *sheep*, and the like, are such creatures as by reason of their sluggishness and unaptness for motion do not fly the dominion of mankind, but generally keep within the same pastures and limits, and may be easily pursued and overtaken, if by accident they should escape; and therefore the owner hath the same kind of property in them as he hath in all inanimate chattels, and for the violation thereof may bring an action of trespass.

Wild animals.

The *wild* animals, such as *deer*, *hares*, *foxes*, and such like, are *t.*

which by reason of their swiftness or fierceness fly the dominion of man; and in these no person can have a property, unless they be tamed or reclaimed by him; and as property is the power that a man hath over any other thing for his own use, and the ability that he hath to apply it to the sustentation of his being, when that power ceaseth, his property is lost; and, by consequence, an animal of this kind, which after any seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the Indies, because I have it no longer in my power or disposal. (See 3 *Bac. Abr.* 324.)

Hence it appears, that by the common law every man had an equal right to such creatures as were not naturally under the power of man, and that the mere caption of or seizure created a property in them. By immediate *taking and killing* them, they belong to such person in the same manner as any other chattels, and cannot be taken from him; since the first seizure and caption was sufficient to vest the property of them in him. 3. *Property in game in general.*
Taking and killing them.

Also by *taking and taming* them, they belong to the owner, as do the other tame animals, so long as they continue in this condition, that is, as long as they can be considered to have the mind of returning to their masters; for while they appear to be in this state, they are plainly the owner's, and ought not to be violated; but when they forsake the houses and habitations of men, and betake themselves to the woods, they are then the property of any man. Taking and taming them.

Another way of gaining property in them is by *inclosure*, and then the beasts must be understood to be mine, as the profits of the soil itself are; and they can no more be taken and carried off than any other profits of the land. Therefore, if deer be inclosed in a park or paddock, or conies in a field or warren, they become so much a man's own that no one ought to kill or take them away. And since in this case it is the inclosure that retains them, (for take away the inclosure, and they are in their natural liberty), therefore the party is said to have a right as he hath to any other profits there inclosed, and a distinct and independent right in every animal. (*Chit. G. L.* 6, 7; *Davies v. Powell, Will. Rep.* 46; 3 *Bac. Ab.* 325.) Inclosing them.

Another way of gaining property in them is on account of their own *inability*, as when birds build in the trees upon a person's land, or rabbits or other creatures make their burrows or nests, and have young ones there, in which case he has a qualified property in the young ones till they can fly or run away, when the property expires. Young ones, &c.

Again: every person has, by the common law, a qualified property in the game *whilst upon his own private ground, ratione soli*; and if a man start any game upon *his own ground*, and follow it upon another's, and kills it there, though a trespasser (*post*, p. 772), the property remains in himself, for the property consists in the possession, which possession commences by the finding of it on his own land, and is continued by the immediate pursuit. (*Keble v. Hickeringle*, 11 *Mod.* 75; 2 *Bla. Com.* 419.) So, if a stranger starts game in one man's *chase, park, or free warren*, and hunts it into another's liberty, the property continues in the owner of the chase or warren, this property arising from privilege, and not being changed by the wrongful act of a mere stranger. (*Sutton v. Moody*, 1 *Ld. Raym.* 251.) Or, if a man starts game on *another's private ground*, and kills it there, the property belongs to him in whose ground it was killed, because it was started there, the property arising *ratione soli* (*Sutton v. Moody*, 1 *Ld. Raym.* 250.) And in *Blades v. Higgs*, 32 *L. J. C. P. Ex. Ch.* 182, the court decided upon the authority of *Sutton v. Moody*, 1 *Ld. Raym.* 250, and *Ld. Lonsdale v. Rigg*, 1 *H. & N.* 923, that where wild animals are both started and killed upon the same estate they are the absolute property of the landowner, and not of the captor, and this decision was afterwards affirmed by the House of Lords, 11 *H. of L. cases*. Whereas, if after

4. *Property in, and laws as to, game in franchised places.*

being started there, it is killed on the ground of a third person, the property belongs not to the owner of the first grounds, because the property is local—nor yet to the owner of the second, because it was not started on his soil; but it vests in the person who started and killed it, though guilty of a trespass against both owners. (*Sutton v. Moody*, 1 *Ld. Raym.* 251; *Churchward v. Studdy*, 14 *East*, 247; 2 *Bla. Com.* 419. See *Deacon*, *G. L.* 38. The 1 & 2 Will. 4, c. 32, s. 7, (as we shall hereafter see), gives to the landlord, in certain cases, a right to the game, in exclusion of his tenant, (*post*, p. 752).

IV. Property in, and Laws as to, Game in Franchised Places.

1 & 2 Will. 4, c. 32, ss. 6, 8, 9.
In general every certificated person may kill game.

Statute 1 & 2 Will. 4, c. 32, not to affect any existing or future agreements respecting game,

nor any rights of manor, forest, chase, or warren.

Act not to affect King's forest rights, &c.

The 1 & 2 Will. 4, c. 32, s. 6, authorises every person to kill game if he has taken out a certificate, subject only to his liability for committing any trespass in pursuit of it; and sect. 8 provides, "that nothing in this act contained shall authorise any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by any deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever; nor shall any thing in this act contained defeat or diminish any reservation, exception, covenant, or agreement already contained in any private act of Parliament, deed, or other writing relating to the game upon any land, nor in any manner prejudice the rights of any lord (a) or owner of any forest, chase or warren, or of any lord of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or of any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty." (*Vide post*, p. 752.)

Sect. 9. "Nothing in this act contained shall in any way alter or affect the prerogative, rights, or privileges of his Majesty, his heirs, or successors, nor the powers or authorities now vested in the commissioners of his Majesty's woods, forests, and land revenues, in or relating to any of his Majesty's forests or the boundaries thereof, nor in or relating to the appointment of any stewards, gamekeepers, or other officers of any of his Majesty's forests, parks, or chases, or of any hundred, honor, manor, or lordship being part of the possessions and land revenues of the crown, nor the rights, privileges, or immunities of any chief justice in eyre (b) or any warden, deputy warden, or lieutenant of any of his Majesty's forests, or any rangers, verderers, foresters, master-keepers, under-keepers, or other officers of or in any such forests, parks, or chases, or of any person entitled to any right or privilege under them or any of them, nor the rights or privileges of any persons holding under any grants or purchases from the crown, nor give to any lord of any manor or manors within any forest or the boundaries thereof, nor to any other person whatsoever, any privileges, rights, or powers within any such forest, park, or chase, or the boundaries thereof, which he did not possess, or to which he was not entitled before the passing of this act; but that all the aforesaid prerogatives, immunities, privileges, rights, and powers shall remain as if this act had not been made."

(a) By sect. 2, *post*, p. 752, n. (c), the term includes a lady of a manor, &c.

(b) By the 57 Geo. 3, c. 61, the office of chief justice in eyre, north and south of Trent, was abolished on

the termination of the then existing interests, and the duties are to be performed by the first commissioner of his Majesty's woods, forests, and land revenues. (*Deac. G. L.* 12.)

The franchises or royalties relating to game are ranked in the following order, *viz.*—first, a forest—secondly, a free chase—next, a park—and, lastly, a free warren.

4. *Property in, and laws as to, game in franchised places.*

Forests.—A forest (a) is a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide there in the safe protection of the Queen, for her delight and pleasure; which territory of ground so privileged is meered and bounded with unremovable marks, meers, and boundaries, either known by matter of record or by prescription; and also replenished with wild beasts of venery or chase, and with great coverts of vert for the succour of the said beasts there to abide; for the preservation and continuance of which, there are particular officers, laws, and privileges, belonging to the same, requisite for that purpose, and proper only to a forest and to no other place. (*Manw.* 143.)

In franchises.
Forests.

Vert comprehends every thing which bears green leaves in the forest. (*Manw.* 146.)

And the lord having the wood in the tenant's land, which is still customary in many manors, was originally for preservation of the vert, for the sustentation of the lord's game there.

Beasts of forest are properly hart, hind, buck, hare, boar, and wolf; but legally all wild beasts of venery or hunting including those of chase and warren. (1 *Inst.* 233.)

As to the hunting, &c. deer in forests, see *post*, p. 800.

Purlieu.—*Purlieu* comes from the French *pur*, clear, entire, and exempt, and *lieu* a place; that is, a place, entire, clear, or exempt from the forest: and signifies those grounds which Henry the Second, Richard the First, or King John, added to their ancient forests, over other men's grounds, and were disafforested by the statute of *charta de foresta*. (4 *Inst.* 303; *Manw.* 242.)

Purlieu.

But nevertheless the *purlieu*, as to some purposes, is forest still, and is disafforested as to the particular owners of the land, and for their benefit, and not generally to give liberty to any man to hunt the wild beasts and spoil the vert. And if those beasts escape out of the forest into the *purlieu*, the king hath a property in them still against any man but against the owners of the woods and lands in which they are; and such owners have a special property in them *ratione loci*, but yet so that they hunt them fairly, and not forestall them in their return towards the forest. (*Manw.* 292.)

But a *purlieu* man may not hunt in every man's lands within the *purlieu*, but in his own lands only; and therefore if he find the beasts of the forests in his woods or lands in the *purlieu*, in such case he hath property in them against any other man *ratione soli* (the Queen only excepted). And if he begin the hunting in his own lands, then by reason of that property he may pursue his hunting through any man's woods or lands, so that he doth not enter into any forest, chase, park, or warren. And if he kill the beast in another man's land, and out of such privileged place, he may take and carry away the same by reason of the first property. But if the beast recover the forest, he must call back his dogs, for they are then the Queen's wild beasts again. And if he do not call back and rebuke his dogs, and they kill the beast in the forest, he is a trespasser, though himself never came within the bounds thereof. But if in hunting towards the forest

(a) As to forests in general, see *Chil. G. L.* 14; *Manwood*, tits. Chase, Forests; *Com. Dig.* Chase; *Deacon, G. L.* 43. It seems forestal

rights, properly so called, are not grantable to a subject. (*Attorney-General v. Marquis Downshire*, 5 *Price*, 269; *Manw.* Part II. c. 3, 4).

4. *Property in, and laws as to, game in franchised places.*

the dogs fasten on it before it is within the bounds thereof, and the dogs still hanging on are drawn by the deer into the forest, and it is killed there, then by reason of the first property, which he had *ratione soli*, and also by the pursuit and possession thereof before it entered the forest, he may lawfully enter and take it. (*Manw.* 294.)

Chase.

Chase.]—A *chase* (from *chasser*, to chase) is a privileged place for receipt of deer and beasts of the forests, and is of a middle nature betwixt a forest and park. It is commonly less than a forest, and not endowed with so many liberties, as officers, laws, courts, and yet is of a larger compass than a park, having more officers and game than a park. Every forest is a chase, but every chase is not a forest. It differeth from a park in that it is not inclosed; for if it be inclosed, it is a good cause of forfeiture; though it must have certain metes and bounds, but it may be in other men's grounds as well as in one's own. (*Manw.* 49, 174.)

Beasts of chase are, the buck, doe, fox, marten, and roe. (*Manw.* 144.) And according to Lord *Coke* all beasts of venery or hunting are beasts of chase. (*Co. Lit.* 233, a.)

Park.

Park.]—A *park* (from the French word *parquer*, to inclose) is a large parcel of ground privileged for wild beasts of chase by the Queen's grant, or by prescription.

A park must be inclosed; for if it lie open, it is a good cause of seizure into the Queen's hands, as a thing forfeited; and the owner cannot have an action against those that hunt in his park, if it lies open (*Id.*); *sed quere*, if it be a ground of forfeiture. (See *Leicester's case*, *Cro. Jac.* 755.)

If any one erect a park without the Queen's grant, a *quo warranto* may be issued and the park destroyed. (*Bro. Ab. tit. Action sur le Statute*, pl. 48.) There may indeed be a park in reputation erected without lawful warrant, and the owner may bring his action against persons killing his deer. (*Wood's Inst.* 207.)

The beasts of park properly extend to the buck, doe, fox; but in a common and legal sense to all the beasts of the forest.

The owner or keeper of a lawful park may shoot any dog running after deer in it. (1 *Saund.* 84, n. 3.)

As to chasing, &c. deer in parks, and breaking park palings, see *post*, p. 801.

Deer in a park shall go to the heir, and not to the executor. (1 *Inst.* 8; *Davies v. Powell, Willes*, 46.) But they may be so tamed and reclaimed from their natural wild state as to pass to the executors as personal property, although confined in an ancient and legal park. The question whether they are so tamed must be determined by the nature and state of the animals, the place in which they are kept, and their mode of treatment. (*Morgan and an. v. Id. Abergavenny*, 8 C. B. 768.)

Free warren.

Free Warren.]—A *free warren* is a place privileged by prescription or grant of the Queen, for the preservation of the beasts and fowl of the warren, *viz.*, hares, conies, roes, partridges, rails, quails, pheasants, woodcocks, mallards, and herons. (*Manw.* 44. See *The Attorney-General v. Parsons*, 2 C. & J. 279.)

A grant by the Queen of free warren in land of which she is seised in fee, is a grant of free warren in gross. (*Morris v. Dimes*, 1 *Ad. & E.* 654.)

Free warren cannot be parcel of a manor, and therefore will not pass by a grant of the manor with the appurtenances, though it be held with the manor. (*Id.*) A warren can only be appertaining to a manor by prescription. (*Id.*)

Free warren in possession of which a grantor is seised in fee will not pass by a grant of a manor and all free warren (or other term comprehending free warren) belonging to or in anywise appertaining to the manor, or therewith or at any time theretofore usually held and occupied and enjoyed, or accepted, reputed, deemed, taken or known as part, parcel, or member thereof. (*Id.*)

A free warren may lie open, there being no necessity of inclosing it. (*Read, Game.*)

Conies in a warren shall go to the heir, and not to the executor. (1 *Inst.* 8.)

A free warren is not forfeited by nonuser, *Co. Lit.* 2. a., 114. b.; *The case of Leicester Forest*, *Cro. Jac.* 155; but it may be by misuser. (*Keilw.* 148, n.; *Cro. Eliz.*, 548.)

The owner of a free warren may lawfully kill any dog which is used to haunt the warren. (*Wadhurst v. Damone*, *Cro. Jac.* 45; *Wright v. Ramscot*, 1 *Saund.* 84, n. 3; *Vere v. Lord Cawdor*, 11 *East*, 568.) And see further as to such powers, *post*, p. 760.

An action lies for hunting in a free warren, though no game be taken. (*Lord Dacre v. Tebb*, 2 *Bla. Rep.* 1151; *Patrick v. Greenway*, 1 *Saund.* 346 b; *Merest v. Harvey*, 5 *Taunt.* 442.)

Trespass in a free warren will not lie for shooting grouse. (*Duke of Devonshire v. Lodge*, 7 *B. & C.* 36.)

Where the ownership of the land remain in the lord subject to certain several rights of pasture by owners of cattle-gates, the lord may maintain trespass against any of the cattle-gate owners for sporting over it without his permission. (*Rigg v. Lord Lonsdale*, 1 *H. & N.* 923.)

By the 48 Geo. 3, c. 47, a private enclosure act, after directing an allotment to the lord in lieu of his rights in the wastes, and his rights over the same, save and except as thereafter excepted and thereby reserved to him, an allotment of the residue was directed amongst those who were entitled to rights of common, reserving the rights to minerals; and by sect. 34, it was provided that nothing in the act was to defeat or lessen the interest of the lord for the time being, but that he should hold and enjoy all piscaries, fishing, hunting, hawking, fowling, and all beasts and birds considered as game, as amply as then enjoyed by him. The court decided that under this clause the right to the game and the shooting over the allotments was reserved to the lord. (*Lord Leconfield v. Dixon*, *L. R.* 3 *Q. B.* 30.)

In an action of trespass for entering a free warren, and which is sustainable even against the owner of the soil, brought before the 3 & 4 Vict. c. 24, (see *post*, p. 779), it was held that the plaintiff was entitled to full costs, though he recovered less than 40s.; for, as observed by *Blackstone, J.*, "In actions instituted merely for breaking free warren, it is impossible the title to the soil can ever come in question; for though both may concur in one person, yet the title to the free warren is always collateral to that of the land; for a man may have a free warren in alieno solo."

General Observations on Franchises or Royalties relating to Game.—It is not lawful for any person to make any chase, park, or warren, in his own freehold, or elsewhere, to keep in it any wild beasts or birds of forest, chase, park, or warren, without the Queen's grant or warrant so to do; and if any man do, he is to be punished in a *quo warranto*, and the franchise to be seized into the Queen's hands. (*Manw.* 56.) In *Rex v. Sir William Lowther* (2 *Ld. Raym.* 1409), it was moved for leave to file an information in nature of a *quo warranto* against Sir William Lowther, to show by what authority he had made and set up a warren. But it was denied by the court: because they said it was of a private nature only. And the like motion had been

4. *Property in, and laws as to, game in franchised places.*

General observations as to these franchises or royalties.

5. *Property in, and laws as to, game in particular places, as manors, &c.*

denied before, in the case of the Lord Lisburn; and see *ante*, p. 743, and *post*, p. 750.

Twenty years' undisturbed exercise of a claim of chase, free warren, or park, would always, before the 2 & 3 Will. 4 c. 71, s. 2, as in the case of other rights to real property, have afforded presumptive evidence of right in the party so enjoying it; and see now that statute. (*Bealey v. Shaw*, 6 East, 215; *Weld v. Hornby*, 7 East, 199; *Goodtitle v. Baldwin*, 11 East, 488; *Yard v. Ford*, 2 Saund. 175, n. 2; and see *Gray v. Bond*, 2 B. & Ald. 667; *Pickering v. Noyes*, 4 B. & C. 639.)

Franchises of the above description may be destroyed by a reunion with the crown from which they issued, or by the surrender of the person entitled to them, or by his forfeiture, in consequence of a breach of trust upon which they were granted, as by misuser. (3 Cruise, 301; *Keilw.* 148; *Cro. Eliz.* 548; *Bro. Ab. Warren*, tit. *Extinguishment*.) Unity of possession and grant does not destroy the prescriptive right. (4 Inst. 318; 3 Dyer, 326. See *Chit. G. L.* 23.)

A person may have common in a chase, as well as in the forest, but a forest is governed by the forest law, and a chase and park by the common law. (4 Inst. 314; *Manw.* 52.)

And by the common law (says *Blackstone*), no person is at liberty to take or kill any beast of chase, but such as have an ancient chase or park; unless they be also beasts of prey. (2 Bla. Com. 416.)

If I find a pheasant in my lands, and I let my hawk fly, I may follow the flight into another man's land by reason of the first property which I had in the pheasant *ratione soli*; and if my hawk kill the pheasant in another man's land, I may enter and take it, by reason of that property and pursuit; and in that case, I shall not be punished as a trespasser for taking and carrying away the pheasant, but only for entering the ground. But if the pheasant fly into a warren (which is a privileged place for birds of warren), and the hawk kill it there, the falconer shall not have the pheasant, but the owner of the warren. And the law is the same in the cases of all wild beasts of the forest and chase. (*Manw.* 389.)

If conies are hunted out of the warren, or deer out of the park, and the warrener or parker pursues them, he may retake them; for, in parks and warrens, officers are established by authority to have an eye over the game, and to keep it within the boundaries; so that the property is not altered by driving it out of the inclosures, unless it be also out of the pursuit of the officers; for as long as he that is thus trusted doth pursue it, it is not in its natural liberty, but is still belonging to the park or warren. (3 Bac. Abr. 326.)

V. Property in, and Laws as to, Game in Manors, Warrens, Decoys, Preserves, and Private Grounds.

Manors.

Manors (a).—There are but very few privileges with respect to game in manors, and those privileges are allowed only by statute. (See *Chit. G. L.* 23.) The lord of a manor cannot sport in another's soil, whether a freeholder or a copyholder, though within his manor; without being subject to an action of trespass. (2 Bla. Com. 39, 419; *Keble v. Hickringill*, 11 Mod. 74; and see *Bourne v. Taylor*, 10 East, 181; *et per Cur.*, in *Pickering v. Noyes*, 4 B. & C. 639.)

(a) See *Doe d. Beck v. Heakin*, 6 A. & E. 495, as to what is evidence of a manor; *et vide post*, p. 759. And see *Brisco v. Lomax*, 3 Nev. & P.

308; *Nichols v. Parker*, 14 East, 381, as to what is evidence of the boundaries of a manor.

In regard, however, to the waste lands within the manor, the lord has the right of sporting over them; but his right is not a mere liberty; it is a right enjoyed by him in respect of the ownership of the soil (*Greathead v. Morley*, 3 Scott, N. R. 538, per Tindal, C. J.); and he has at common law the same remedy against trespassers as if such lands were inclosed.

By the 1 & 2 Will. 4, c. 32, s. 10, nothing herein contained shall defeat or diminish the rights or privileges which any lord (a) of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, may, before the passing of this act, have exercised in or over such wastes or commons; and that the lord or steward of the crown of every manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall have the right to pursue and kill the game upon the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty, and to authorise (b) any other person or persons who shall have obtained an annual game certificate to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon.

By sect. 14, lords of manors may grant deputations. (See *post*, p. 758.) Also by sect. 13, lords of manors are empowered to appoint and authorise gamekeepers to preserve and kill game within the manor.

The lord of a manor, having also by sect. 13 power to authorise his gamekeeper to seize all such dogs, nets, and other engines, as may be used within the manor by any person not authorised to kill game for want of a certificate, has authority, as it would seem, to make such seizure himself, on the principle of *omne majus continet in se minus*. But neither himself, nor his gamekeeper, has any right to seize the dogs of a person who has a certificate; and still less to destroy them, notwithstanding the liability of their owner for the trespass. (*Vere v. Lord Cawdor*, 11 East, 568, *post*, p. 760.) With respect, however, to the seizure of dogs used by persons having no certificate, it seems that he has the same right to destroy such dogs as a magistrate was held to possess under the 5 Anne, c. 14, in regard to the dogs of unqualified persons. (*Kingsworth v. Bretton*, 5 Taunt. 416; *Roy v. Duke of Beaufort*, 2 Atk. 190; 2 Bla. Com. 417.) For the 13th section of the 1 & 2 Will. 4, c. 32, authorises the seizure of the dog, for the use of the lord of the manor; and such an authority, it has been held, implies a right to destroy it. (*Deac. G. L.* 60, *post*, p. 760.)

By the 4 & 5 Vict. c. 35, s. 82, intituled "An act for the Commutation of certain manorial rights in respect of lands of copyhold and customary tenure, and in respect of other lands subject to such rights, and for facilitating the enfranchisement of such lands, and for the improvements of such tenure," it is enacted, "That no commutation under this act shall operate to affect any rights of lords of manors to escheats, fairs, markets, appointments, franchises, royalties, rights, liberties and privileges of chase and free warren, hunting, hawking, fowling, and of chasing and killing game, and beasts of chase and free warren, and all ancient piscaries, fisheries, and rights of fishing, or any rights in any mines and minerals or quarries within or under the said lands and hereditaments, or any other manorial rights whatever, unless expressly commuted under this act: Provided always, that nothing in this act contained shall operate to authorise or empower any lord of any manor to enclose any common or waste lands, or any part thereof." (See a similar provision in sect. 48 of 15 & 16 Vict. c. 51, an Act for Extending the Acts for the Commutation of Manorial Rights and the Gradual Enfranchisement of Copyholds. (See *tit. Manor*.)

(a) The act includes ladies of manors, &c., p. 752, n. (c). (b) See *post*, p. 752.

5. Property in, and laws as to, game in particular places, as manors, &c.

1 & 2 Will. 4, c. 32, s. 10.

Power of the lord to seize dogs, &c.

4 & 5 Vict. c. 3

5. *Property in, and laws as to, game in particular places, as manors, &c.*

Hare and rabbit warrens.

Hare and Rabbit Warrens.—Hare and rabbit warrens, not being free warrens, have not any peculiar privileges as to game, except those given by statute.

We have already seen *such* a warren may be made without any licence from the Queen. (*Ante*, p. 746.) A person may keep as many hares or rabbits as he likes, though they may be injurious to his neighbour, as they are animals *feræ nature*, and as he has no interest in them when off his land. (3 *Bac. Abr.* 326; *Boulston v. Hardy*, 5 *Rep.* 105; *Hursley v. Wilkinson*, *Cro. Car.* 387.)

Formerly it was held that a person who had a right of common might kill them when they were out of the warren, and were destroying the common; but that he could not have an action on the case against the lord, for that would have created a multiplicity of actions. (*Boulston v. Hardy*, *Cro. Eliz.* 548; *Hadesden v. Gryssel*, *Cro. Jac.* 195; *Hursley v. Wilkinson*, *Cro. Car.* 388.)

But it was also held that if the lord had a right to put conies upon the common, and by an excess in the number surcharged the common, and by the number of burrows made by the conies prevented the commoner's cattle from depasturing the common, an action in such case was the proper remedy, and that the tenant might not of his own accord fill up the burrows and remove the nuisance. (*Cooper v. Marshall*, 1 *Burr.* 259.)

By 1 & 2 Will. 4, c. 32, s. 12, the tenant of land is empowered to kill rabbits on his land, and he may authorise persons to do so in his behalf. (*Spicer v. Barnard*, 28 *L. J. M. C.* 176.) But he may not grant leave to other persons to sport over the land. (1 & 2 Will. 4, c. 32, s. 30.)

As to the offence of killing &c. hares and rabbits in warrens, see *post*, p. 801.

Decoys.

Decoys.—A decoy is a place set apart for the taking of wild fowl, and is it seems so far a privileged place, that a party may be sued for knowingly firing a gun or making a noise so near it as to frighten away the fowl, for it is maintained at considerable expense and trouble, and is a means of carrying on a trade. (*Keble v. Hickringill*, 11 *East*, 574.) And in the case of *Carrington v. Taylor*, (11 *East*, 574,) it was held, that firing at wild fowl, to kill and make profit of them, by one who was at the time in a boat on a public river or open creek where the tide ebbs and flows, so near to an ancient decoy on the shore, about 200 yards, as to make the birds there take flight, the defendant having before fired at a great distance from the decoy, which brought out some of the birds from thence, though he did not fire into the decoy pond, was evidence of wilful disturbance of and damage to the decoy, for which an action on the case was maintainable by the owner. Such an action would not lie for frightening rooks from a rookery. (*Hannam v. Mockett*, 2 *B. & C.* 934.) A man has a right to set up a decoy on his own ground, notwithstanding it is near to another in his neighbour's land. (*Per Holt, C. J.*, in 11 *East*, 576; *Deac. G. L.* 63.)

Rookery.

Preserves and private grounds.

Preserves and Private Grounds.—Preserves and private grounds have no peculiar common-law privileges relating to the game within them. It has therefore been held, that no action will lie for frightening game from a preserve against a person who shoots near it, but upon his own land. (*Carrington v. Taylor*, 11 *East*, 574, n. See *Deac. G. L.* 63.)

Property in game by the common law.

We have already seen what property in general the owner of a preserve or private ground has in the game therein. (*Ante*, p. 743.) Such owner has in general a property in the game *ratione soli* whilst upon it, and if *started and killed there* by a third person, such property is not divested. (*Ante*, p. 743.) But it would be otherwise if not killed there. (*Churchward v. Studly*, 14 *East*, 247.)

The owner of land in his own occupation may in general prohibit every one from killing game thereon, except the owner of a chase or free warren, or him to whom he has granted the right to do so.

The occupier of a private ground or preserve has also similar rights by the common law; but these are narrowed by the 1 & 2 Will. 4, c. 32.

A demise or grant of a mere right of hunting, shooting, or fishing, or the like, being of an incorporeal hereditament, must be by deed. (*Bird v. Higginson*, 2 A. & E. 696; *Year-book*, 11 Hen. 7, fol. 86; see *Wickham v. Hawker*, 7 M. & W. 63, per Parke, B.)

In the case of *Overseers of Hilton v. Overseers of Bowes*, L. R. 1 Q. B. 359, where the rights of sporting over certain lands enclosed by act of parliament was expressly reserved by the act, and vested in certain persons, the Court of Queen's Bench held that the effect of the act was to sever the right of shooting from the soil, and thus to make the right of shooting an incorporeal hereditament, which could not be rated; but *Blackburn, J.*, states in his judgment, "If the facts were that the right were still attached to the land, and the shooting were let to a third person, the effect of that might possibly raise some nice questions as to rating." Again in *Reg. v. Battle*, 15 L. J. N. S. 180, where the owner and occupier of land let the right of sporting over it and the taking of game upon it for an annual rent, the sessions found that the land would be worth 22*l.* 10*s.* a year to let with the right of taking game thereon, and 18*l.* a year if such right were reserved to the landlord, and the Court of Queen's Bench decided that the owner and occupier was properly rated at the higher rate, because the right to take game is an incident to the occupation of the land, and if the occupier takes the game himself, or has an equivalent for it, the value of the land is enhanced to him accordingly.

One may give leave to another to hunt or shoot, by parol, (*Id.*); and the licence until revoked would afford a good justification.

A reservation and exception (so called) of the liberty of hawking, hunting, fishing, and fowling, is not legally a reservation or exception, but a privilege or right granted to the lessor. (*Doe d. Douglas v. Lock*, 2 A. & E. 705.) Therefore where, by deed, A. and B. conveyed to D. and his heirs certain lands, *excepting and reserving* to A., B., and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl; it was held that this was not in law a reservation properly so called, but a new grant by D. (who executed the deed) of the liberty therein mentioned; and therefore it might enure in favour of C. and his heirs, although he was not a party to the deed. (*Wickham v. Hawker*, 7 M. & W. 63.)

If there be a personal licence to an individual to hunt at his pleasure, he cannot take away to his own use the game killed, or go with servants, still less send servants to kill for him, or assign his licence to another: but if the person is meant to have a property in the game which he kills, it is otherwise; and, therefore, if the licence is to hunt, kill, and carry away, he may hunt with servants, or by servants. And, *e converso*, if there be a licence for him and his servants to hunt, by these words, "for him and his servants," shall be understood a licence of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a licence the grantee may justify for his servant to hunt, which is more than a licence of pleasure. (*Per Parke, B.*, in *Wickham v. Hawker*, 7 M. & W. 78; *Manwood*, 108.)

The liberty of fowling has been decided in one case to be a profit *à prendre*, and may be prescribed for as such. (*Davies' case*, 3 Mod. 246. The liberty to hawk is one species of *aucupium* (*Manw.* c. 18, s. 10, p. 117), the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit;

5. *Property in, and laws as to, game in particular places, as manors, &c.*

A grant of a mere right to sport must be by deed.

But parol licence, as such suffices.

A reservation or exception, when a grant.

What rights acquired by a grant or licence to sport.

A liberty "to fowl" is a profit *à prendre*. Liberty "to hawk."

5. *Property in, and laws as to, game in particular places, as manors, &c.*

"To fish."

"To hunt."

"To hawk, hunt, fish and fowl."

"To sport."

1 & 2 Will. 4, c. 32. Landlord to have the game under existing leases except in certain cases.

exceptions.

Act not to affect existing or future agreements respecting game, nor rights of manor, forest, chase, or warren (a).

Not to affect cattle-gates or right of common.

Term "lord of manor," &c., to include "lady of manor," &c.

it is common of fishing. The liberty of hunting is open to more question, as that does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. (*Wickham v. Hawker*, 7 M. & W. 79; *per Parke*, B.) A liberty to hunt over premises will not give the liberty of shooting there. (*Per Gibbs*, C. J., in *Moore v. Lord Plymouth*, 7 T. 627.) A grant to a person, *his heirs and assigns*, of free liberty, *with servants or otherwise*, to come into and upon lands, and there to hawk, hunt, fish, and fowl, is a grant of a *licence of profit*, and not of a mere *personal licence of pleasure*; and therefore it authorises the grantee, his heirs and assigns, to hawk, hunt, &c. by his servants, &c. in his absence. Such a liberty, therefore, is a profit *à prendre*, within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. (*Id.*; *Wickham v. Hawker*, *supra*; *Davies' case*, 3 Mod. 246.) As to the effect of a grant to one and his heirs of a liberty to sport, see *Pickering v. Noyes*, 4 B. & C. 639.

By the 1 & 2 Will. 4, c. 32, s. 7, in all cases where any person shall occupy any land under any lease or agreement made previously to the passing of this act, except in the cases hereinafter next excepted, the lessor or landlord shall have the right of entering upon such land, or of authorising any other person or persons who shall have obtained an annual game certificate to enter upon such land, for the purpose of killing or taking the game thereon; and no person occupying any land under any lease or agreement, either for life or for years, made previously to the passing of this act, shall have the right to kill or take the game on such land; except where the right of killing the game upon such land has been expressly granted or allowed to such person by such lease or agreement, or except where upon the original granting or renewal of such lease or agreement a fine or fines shall have been taken, or except where in the case of a term for years such lease or agreement shall have been made for a term exceeding 21 years.

Sect. 8. Nothing in this act contained shall authorise any person seized or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by any deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever; nor shall anything in this act contained defeat or diminish any reservation, exception (b), covenant, or agreement already contained in any act of Parliament, deed, or other writing relating to the game upon any land, nor in any manner prejudice the rights of any lord (c) or owner of any forest, chase, or warren, or of any lord of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or of any steward of the Crown of any manor, lordship, or royalty appertaining to his Majesty.

Sect. 9 provides that the act shall not affect any of his Majesty's forest rights, &c. (See *ante*, p. 744.)

Sect. 10. Nothing herein contained shall be deemed to give to any owner of cattle-gates or rights of common upon or over any wastes or commons any interest or privilege which such owner was not possessed of before the passing of this act, nor to authorise such owner of cattle-

(a) As to such rights, see *ante*, p. 744.

(b) See *ante*, p. 744.

(c) By sect. 2, "the words 'lord of a manor, lordship, or royalty, or

reputed manor, lordship, or royalty,' shall throughout this act be deemed to include a lady of the same respectively."

gates or rights of common to pursue or kill the game found on such wastes or commons; and that nothing herein contained shall defeat or diminish the rights or privileges which any lord (a) of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, may, before the passing of this act, have exercised in or over such wastes or commons; and that the lord or steward of the crown of every manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall have the right to pursue and kill the game upon the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty, and to authorise (*ante*, p. 752) any other person or persons who shall have obtained an annual game certificate to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon.

6. Who may kill or take game, &c.

Lord of manor to have game on waste (a).

Sect. 11. Where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorise any other person or persons who shall have obtained an annual game certificate to enter upon such land for the purpose of pursuing and killing game thereon (b).

Landlord, having reserved the right to the game, may authorise others to kill it.

VI. Who may kill or take Game; Penalty, &c., for killing it, &c., without being authorised.

By the common law any person might kill game unless in the particular places as already noticed in the third section of this title, *ante*, p. 742. But this general right was soon taken away by statutes, which rendered it necessary that a party should have some qualification either in respect of estate or personal dignity. These statutes, however, have been totally repealed by the 1 & 2 Will. 4, c. 32, s. 1, and by this statute, *every one is now at full liberty to kill game on his own land, or on that of another person, with the leave of the person entitled to the game upon the land, provided he takes out the necessary certificate for that purpose*; and provided he be not an occupier of the land, the right of killing game on which is by that act given to the lessor or landlord in exclusion of the right as the occupier, or where such exclusive right is especially reserved by, or granted to, or belongs to, the lessor, landlord, or some other person other than the occupier. This may be collected from the 6th, 12th, and 23rd sections of that act.

Who are authorised to kill game, &c.

Thus by the 1 & 2 Will. 4, c. 32, s. 6, every person who shall have obtained an annual game certificate (c) shall be authorised to kill and take game, subject always to an action, or to such other proceedings as are hereinafter mentioned (d), for any trespass by him committed in search or pursuit of game: Provided always, that no game certificate on which a less duty than 3*l*. 13*s*. 6*d*. is chargeable under the acts relating to game certificates shall authorise any gamekeeper to kill or take any game, or to use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, except within the limits included in his appointment as gamekeeper; but that in any

Certificated persons may kill game, subject to the law of trespass.

Proviso as to gamekeepers.

Gamekeepers not

(a) As to the rights of the lord of the manor, see *ante*, p. 748.

(b) *Vide ante*, p. 751, as to a grant of a right of sporting, &c.

(c) By sect. 5 of this act, *post*, p. 762, it is not to affect the existing laws respecting game certificates.

By the 23 & 24 Vict. c. 10, new duties are imposed as "game certi-

ficates," which words are to be construed to mean "licences to kill game." Pursuant to 23 & 24 Vict. c. 90, s. 6, for the sum of 3*l*. 13*s*. 6*d*. mentioned in this act, must now be substituted the sum of 3*l*., see the section, *post*, p. 765.

(d) *Post*, p. 772.

6. *Who may kill or take game, &c.*

1 & 2 Will. 4, c. 32. to act beyond limits of appointment.

Where the landlord, &c. has the right to the game in exclusion of the occupier, the occupier shall be liable to a penalty for killing it.

case where such gamekeeper shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, beyond such limits as aforesaid, he may be proceeded against under this act, or otherwise, in the same manner to all intents and purposes as if he had no game certificate whatsoever. (See *post*, p. 758.)

Sect. 12. Where the right of killing the game upon any land is by this act given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to, the lessor, landlord, or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before 2 justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l.*, and for every head of game so killed or taken such sum of money not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction.

Under this section the tenant of a farm has the right by himself and his servants to kill rabbits upon the farm, though the right of sporting over it is reserved by the landlord, because as this section does not mention rabbits, the legislature must have meant that the tenant should have the right to kill them. (*Spicer v. Barnard*, 28 *L. J. M. C.* 176; *Padwick v. King*, 29 *L. J. M. C.* 42.) A tenant cannot be convicted under this section upon the evidence of a person proving that he had, by permission of the landlord, the exclusive right of shooting over the land and actually preserved the game there; unless it be proved that such permission was by deed, for otherwise he fails to prove that the right of shooting belongs to him. (*Barker v. Davis*, 34 *L. J. M. C.* 140.)

Penalty for killing or pursuing game without a certificate.

Penalty to be cumulative.

Sect. 23. If any person shall kill or take any game (*ante*, p. 742), or use any dog, gun, net, or other engine or instrument for the purpose of searching for or killing or taking game, such person not being authorised so to do for want of a game certificate, he shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction: Provided always, that no person so convicted shall by reason thereof be exempted from any penalty or liability under any statute or statutes relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty (*a*).

Upon an information under this section for unlawfully using engines for taking game without a certificate, the defendant is not competent to give evidence, this being a criminal proceeding for an offence punishable on summary convictions within the 14 & 15 Vict. c. 99, s. 3. (*Cattell v. Ireson*, 27 *L. J. M. C.* 167.) A person is liable to the penalty imposed by this section who sets a trap in the month of March to take pheasants or partridges, the penalty imposed by this section, and sec 3 of the same act being cumulative. (*Sanders v. Baldy*, 14 *W. R. Q. B.* 177.)

This being a penal act should accordingly be construed strictly. (See *Haywood v. Horner*. 5 *B. & Ald.* 317.)

A minor may be convicted for all offences under the game laws: he is answerable for all crimes, offences, and trespasses, when he is of

Enactment should be construed strictly.

An infant subject to the penalty.

(a) By the 23 & 24 Vict. c. 90, s. 4, a penalty of 20*l.* is imposed upon any person taking or killing

game by any means whatever without having first taken out a licence under such act or paying the duty.

sufficient age to distinguish moral right from wrong. (*Christian, G. L.* 191.)

So a married woman, uncertificated, may be convicted of an offence within the act. (See *Christ. G. L.* 191.)

In the case of *Peshall v. Layton* (2 *T. R.* 712, decided before the 1 & 2 Will. 4, c. 32), Lord *Kenyon*, C. J., said, that where several unqualified persons offended by going out together and killing a hare, only one penalty can be recovered, though the prosecutor has its election which he will sue. So, in the case of *R. v. Bleasdale and another* (4 *T. R.* 809), which was a conviction on the repealed stat. 5 Anne, c. 14, s. 4, for using a greyhound to destroy game without being qualified, for which the defendants were convicted in 5*l.* each, the court, without hearing any argument, said the conviction could not be supported, for that it was only one offence, and that the magistrates should only have convicted them in one penalty; and they said that this point had been several times decided, in *Hardyman v. Whitacre* (a) and in other cases: and the conviction was quashed. Therefore, though several persons may join in using a dog, or killing a hare, &c., this is but one offence, for there is in reality but one act done by all; but as there is some difference between the wording of the present enactment and the 5 Anne, c. 14, s. 4, this is not free from doubt; it might be urged that "any person" may mean *each and every person*. At all events, if *each* were using a gun or dog, or each setting a snare, they would each be subject to a penalty; because each would then be guilty of a distinct, separate, and substantive act. (See *Christ. G. L.* 161.)

To catch a hare in a wire will be evidence of taking the hare; although the hare is not killed, nor even taken away by the party who set the snare to catch it. (*R. v. Glover, R. & R.* 269.)

As to what is an using of a gun or dog, for the purpose of searching for or killing or taking game, evidence that the party was seen walking about a field with a gun, accompanied with a pointer or setting dog, apparently in quest of game, will be sufficient proof that he used the gun for the purpose of killing game, and the dog for the purpose of searching for it. (See *R. v. Kay, Sess. Cas.* 88.) So, the using a gun for the purpose of killing game, will be sufficiently established by proving that the party was beating about for game, and was observed to fire off his gun; or that he pointed his gun at a partridge, though he did not actually fire at it. (*R. v. Davies*, 6 *T. R.* 177; *Heben v. Hartley*, 1 *Chit. Rep.* 607.)

In *Rex v. Davies* (6 *T. R.* 177, decided upon the repealed stat. 5 Anne, c. 14, s. 4), where the evidence stated in the conviction was, that the witness was satisfied that the defendant did keep and use a gun to kill and destroy the game, from the circumstance of his hearing a gun go off, and observing that it was fired by the defendant, who was then walking about a piece of ground with that apparent intent, the court affirmed the conviction. Lord *Kenyon*, C. J., said, "*It is sufficient in convictions, if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury: here we cannot say that there was no evidence of the fact for the consideration of the magistrate.*"

In all these cases the justice of the peace himself must be satisfied of the intent, from the circumstances stated by the witness. He must be satisfied that the party was searching for or in pursuit of game, and not of sparrows, larks, or fieldfares. Even if he were in pursuit of woodcocks, snipes, or rabbits, the justice would have no authority to convict under 1 & 2 Will. 4, c. 32.

6. Who may kill or take game, &c.

Feme covert.
Several persons.

Catching a hare evidence of taking it.

What an using.

The justice should be fully satisfied of the intent.

(a) *Bull, N. P.* 189. This case of *Hardyman v. Whitacre* is more fully reported in a note to *Barnard v. Gostling*, 2 *East*, 573.

6. *Who may kill or take game, &c.*

How far an uncertificated person may sport with or for certificated one.

A person (who has a certificate) is empowered to take as many of his servants or other uncertificated persons to attend him as he thinks necessary, and for the purpose of assisting him in raising the game, without subjecting such servants or uncertificated persons either to a penalty for sporting without a certificate (see stat. 23 & 24 Vict. c. 90, *post*, p. 763), or to a penalty under the 1 & 2 Will. 4, c. 32, s. 23, *ante*, p. 754. Thus, in *Rex v. Taylor* (15 *East*, 460, decided under the 5 Anne, c. 14, now repealed), it was held that a servant who went out coursing with his master, who was qualified, could not be convicted for using dogs to kill and destroy game. And in *Lewis v. Taylor* (16 *East*, 49), it was held that an unqualified person being out coursing with the owner of greyhounds who was qualified, although not his servant, and although he took an active part in the sport, was not liable to the penalties imposed by the now repealed act of 5 Anne, c. 14; and Lord *Ellenborough*, C. J., said, "There is no evidence against this defendant upon the charge of using a greyhound for killing the game. This is not a solitary amusement, and there is nothing to prevent a qualified person from taking others with him to aid him in the pursuit of the game; and he is the person using the dogs: the others have no other use of them than as his servants, and contemplating with him the pleasure of the chase. If indeed an unqualified man used his own greyhound for the purpose of sporting, though in the same company with a qualified person, the case would admit of a different consideration: but there can be no ground for recovering the penalty against this defendant, who went out with the dogs of another who was qualified, and which other was using them himself: the defendant's picking up the hare after it was killed is no using of the dogs to kill the game."

Under the repealed statutes, 5 Anne, c. 14, s. 4, and 9 Anne, c. 25, it was decided that an unqualified person was not liable to the penalties imposed upon persons taking game by traps or snares without being duly qualified, when such taking was by the orders of some one who was qualified, and on whose account the game actually was taken. (*R. v. Taylor*, 15 *East*, 460; *Lewis v. Taylor*, 16 *East*, 49; *Walker v. Mills*, 2 B. & B. 1; *Warneford v. Kendall*, 10 *East*, 10.) But in *Ex parte Sylvester*, 9 B. & C. 61, an unqualified servant shooting game by order of and with his master, who was duly qualified, was held liable to the penalty imposed by 5 Anne, c. 14, *Bayley*, J., saying, "That the principle upon which *Lewis v. Taylor* and *R. v. Taylor* had been decided was that the offence charged was in fact the act of the owner and master, and not of those who accompanied him, and in *Walker v. Mills*, the trap was set by the master's orders and in his presence, and must therefore be taken to have been set by him."

What deemed game.

Only hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards are within the act, *ante*, p. 742. Neither this nor the former act includes woodcocks or rabbits as game. (See *per Ashhurst* J., in *Rex v. Thomson*, 2 E. R. 18; *Rex v. Yates*, 1 Ld. Raym. 151.) But woodcocks and rabbits, snipes, quails, and landrails, are comprehended under the 23 & 24 Vict. c. 90, relating to taking out game certificates, *post*, p. 763.

What number of penalties incurred by killing several heads of game, &c.

If an uncertificated person kill several hares, partridges, &c., (see *Reg. v. Matthews*, 10 Mod. 26; *Marriott v. Shaw*, Com. 274; *Crepps v. Derden*, Cowp. 646), or use a dog and also a gun, (see *Rex v. Lovett*, 4 T. R. 152; *Rex v. Blaney*, Andr. 240,) upon the same day, he is it seems only liable to one penalty under the 1 & 2 Will. 4, c. 32, s. 23. (*Deac. G. L.*, and see *per Crompton*, J., in *R. v. Scott*, 4 B. & S. 368.) On a conviction under the 4 & 5 Anne, c. 14, exception was taken that the person was charged with so many *sl.* as he had killed hares in the same day; and the court were of opinion that the offence for which the statute gave the forfeiture was the keeping of dogs and engines, and not killing the hares. In a subsequent case, (*Rex v. Lovett*, 7 T. R.

152,) also decided under the same act, Lord *Kenyon*, C. J., said, "If a person go in pursuit of game with a dog and a gun on the same day, he can only be convicted in one penalty."

It will be observed, that by the 1 & 2 Will. 4, c. 32, s. 12 (*ante*, p. 754), the occupier of land not entitled to the game is subject to a penalty for each head of game killed by him or others with his permission. And that, by other sections of the same act, a penalty is imposed for every head of game killed, &c., out of season, &c. (See ss. 3, 4, 25, 27, *post*, pp. 769, 771.)

A defendant may be convicted of several penalties in the same conviction. (*Rex v. Swallow*, 8 T. R. 284.)

7. Gamekeepers, and power to search, &c., for game.

Several penalties in same conviction.

How far offence punishable by indictment.—In *R. v. Buck*, (2 Stra. 679,) the Court of King's Bench held, that an indictment could not be supported for killing a hare without a qualification, the 5 Anne, c. 14, having appointed a summary proceeding before justices of the peace; nor was it an indictable offence to have nets or guns in possession to kill game. (*R. v. Towning and others*, *Andr.* 303.) The same doctrine would be applicable to an offence against the 1 & 2 Will. 4, c. 32.

How far punishable by indictment.

And although for some purpose several persons, by associating in the commission of an illegal act, may become indictable for a conspiracy, yet several persons cannot be indicted at common law for conspiring simply to kill game; and therefore in *R. v. Turner and others*, (13 East, 228,) where the defendants resolved to go into a preserve, or place set apart for the protection of hares, with arms by night, and take and carry away hares, which they accordingly did, it was held, they could not be indicted for it as for a conspiracy. Lord *Ellenborough*, C. J., there said he should be sorry to have it doubted, whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.

Conspiring to kill game, &c.

As to the offence of night poaching against 9 Geo. 4, c. 69, see *post*, p. 792. As to stealing deer and hares, &c., see *post*, pp. 800, 801.

Night poaching, &c.

VII. Gamekeepers, and herein of the Power to Search for, Seize, and Kill Hares and other Game, &c.

By 1 & 2 Will. 4, c. 32, s. 13, it shall be lawful for any lord (a) of a manor, lordship, or royalty (b), or reputed manor (c), lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, by writing under hand and seal, or in case of a body corporate, then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers to *preserve or kill* the game within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty, for the use (d) of such lord or steward thereof, and to authorise such gamekeeper or gamekeepers within the said limits to seize and take

Lords of manor, &c. may appoint gamekeepers (a).

(a) The repealed acts relative to the appointment of gamekeepers are the 22 & 23 Car. 2, c. 25, s. 2; 5 Anne, c. 14, s. 4; and 9 Anne, c. 25, s. 1.

(b) As to what manor, lordship, or royalty is sufficient, see *post*, p. 759; as to the rights of the lord, see *ante*, p. 748.

(c) Where the defendant pleaded that he had been deputed gamekeeper by the lord of a manor, and the jury negatived the existence of a manor,

it was held that this amounted to a negative of the existence of a reputed manor. (*Bush v. Green*, 4 Bing. N. C. 41.)

(d) Where a gamekeeper kills game within the manor of his principal, the presumption is that the killing was for the use of his principal; as, where an act may be lawful or unlawful, the law presumes the former until the contrary be shown. (*Spurrier v. Vale*, 10 East, 413.)

7. *Gamekeepers, and power to search, &c., for game.*

1 & 2 Will. 4, c. 32.

Power of gamekeepers in manors.

Lords of manors, &c. may grant deputations.

Appointment of gamekeepers in Wales.

Appointments of gamekeepers to be registered with clerk of peace.

for the use of such lord or steward all such dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used within the said limits by any person not authorised to kill game for want of a game certificate (*post*, p. 765).

In *Doddle v. Hicton*, 17 L. T. N. S. 549, an appeal from the county court of Derbyshire, it appeared that the respondent was found on Sunday with a gun poaching upon lands forming part of a manor. The appellant, a gamekeeper, duly appointed for the manor, took the respondent's gun from him, whereupon he brought an action of trover in respect thereof. The Court of Exchequer held that under this section there was no right to take the gun, that word being used in previous section of the act but left out here.

Sect. 14. It shall be lawful for any lord of a manor, lordship, or royalty (*post*, p. 759), or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, to appoint and depute any person whatever, whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male servant of any other person or not, to be a gamekeeper for any such manor, lordship, or royalty, or reputed manor, lordship, or royalty, or for such division or district of such manor, lordship, or royalty, as such lord or steward of the crown shall think fit, and to authorise such person, as gamekeeper, to kill game within the same for his own use or for the use of any other person or persons who may be specified in such appointment or deputation, and also to give to such person all such powers and authorities as may by virtue of this act be given to any gamekeeper of a manor; and no person so appointed gamekeeper, and empowered to kill game for his own use or for the use of any other person so specified as aforesaid, and not killing any game for the use of the lord or steward of the crown of the manor, lordship, or royalty, or reputed manor, lordship, or royalty, for which such deputation or appointment shall be given, shall be deemed to be or shall be entered or paid for as the gamekeeper or male servant of the lord or steward making such appointment or deputation, any thing in any act or acts contained to the contrary notwithstanding.

Sect. 15. It shall be lawful for every person who shall be entitled to kill the game upon any lands in Wales of the clear annual value of 500*l.*, whereof he shall be seised in fee or as of freehold, or to which he shall otherwise be beneficially entitled in his own right, if such lands shall not be within the bounds of any manor, lordship, or royalty, or if, being within the same, they shall have been enfranchised or alienated therefrom, to appoint, by writing under his hand and seal, a gamekeeper or gamekeepers to preserve or kill the game over and upon such his lands, and also over and upon the lands in Wales of any other person, who, being entitled to kill the game upon such last-mentioned lands, shall by licence in writing authorise him to appoint a gamekeeper or gamekeepers to preserve or kill the game thereupon, such last-mentioned lands not being within the bounds of any manor, lordship, or royalty, or having been enfranchised or alienated therefrom: and it shall be lawful for the person so appointing a gamekeeper or gamekeepers to authorise him or them to seize and take, for the use of the person so appointing, upon the lands of which he or they shall be appointed gamekeeper or gamekeepers, all such dogs, nets, and other engines and instruments for the killing or taking of game as shall be used upon the said lands by any person not authorised to kill game for want of a game certificate.

Sect. 16. No appointment or deputation of any person as a gamekeeper by virtue of this act shall be valid, unless and until it shall be registered with the clerk of the peace for the county, riding, division, liberty, franchise, city, or town wherein the manor, lordship, or royalty or reputed manor, lordship, or royalty, or the lands, shall be

situate, for or in respect of which such person shall have been appointed gamekeeper; and in case the appointment of any person as gamekeeper shall expire or be revoked, by dismissal or otherwise, all powers and authorities given to him by virtue of this act shall immediately cease and determine.

Sect. 6. No game certificate on which a less duty than 3*l.* 13*s.* 6*d.* (*a*) is chargeable under the acts relating to game certificates shall authorise any gamekeeper to kill or take any game, or to use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, except within the limits included in his appointment as gamekeeper; but that in any case where such gamekeeper shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game, beyond such limits as aforesaid, he may be proceeded against under this act, or otherwise, in the same manner to all intents and purposes as if he had no game certificate whatsoever. (*Vide post*, p. 761).

Sect. 31 (*post*, p. 775) empowers gamekeepers, under certain circumstances, to arrest trespassers in pursuit of game.

Sect. 36 empowers gamekeepers to take game from trespassers. (See *post*, p. 777).

The regulations as to the gamekeeper's certificate will be found *post*, p. 765).

The lord of a hundred or wapentake cannot, it seems, grant a deputation to a gamekeeper. (*Lord Aylesbury v. Pattison*, Dougl. 28; *Com. Dig. Justices of the Peace* (B.), 46; *Deac. G. L.* 24.)

A college or corporation may. (*Spurrier v. Vale*; 10 *East*, 413.)

In an action for penalties for killing game, to which an appointment under the now repealed stat. 5 Anne, c. 14, by a lord of the manor, was pleaded as an exemption, the Court of King's Bench decided that the true question was, not whether the gamekeeper acted *bond fide*, but whether the person under whose deputation he acted had any colourable title to the manor or not; and that in such a case, evidence of real title is admissible to rebut the presumption of colourable title. Where, therefore, the only evidence of colourable title to the manor was the appointment since 1806 of two gamekeepers, evidence of actual title was held to be admissible, both for the purpose of repudiating the colourable title, and also of showing that it was within the knowledge of the plaintiff that manorial rights had been openly exercised by others, and that he had no ground of claim whatever. (*Hunt v. Andrews*, 3 B. & Ald. 341). If there be no colourable title, or if the presumption of it be rebutted, the penalties of the game laws will attach upon the gamekeeper, and the circumstance of his acting *bond fide* will constitute no defence. (*Calcraft v. Gibbs*, 4 T. R. 681; 5 T. R. 19, S. C.; *Wetherall v. Hall*, Cud. 230.) Showing a seisin in fact, and the exercise of manorial rights, is evidence of a colourable title. (*Blunt v. Grimes*, 4 T. R. 682). Reputation is not evidence of the existence of a manor, without a foundation being first laid. (*Rushworth v. Craven*, 1 Mac. & Y. 417.) Books preserved in the office of the clerk of the peace, containing enrolments of ancient deputations of gamekeepers for a certain manor, are admissible in evidence to show that those persons, who caused the enrolments to be made, had exercised rights as lords of the manor; and they are admissible, without proof that the original deputations have been lost, or that the gamekeepers named in them have acted under their authority. (*Hunt v. Andrews*, 3 B. & Ald. 341. See *Deacon, G. L.* 25.) And see further, *Doe v. Heakin*, 6 A. & E. 495, as to what is evidence of the existence of a manor, and that a party is the lord.

A devisee of a manor in trust may, it seems, appoint a gamekeeper merely to preserve the game, but not for the purposes of an establish-

7. Gamekeepers, and power to search, &c., for game.

1 & 2 Will. 4, c. 32. Cannot act as such beyond the limits of his appointment.

Power over trespassers.

Gamekeeper's certificate.

What manor, &c. or title to, sufficient.

(a) See note (c) *ante*, p. 753; the duty is now altered.

7. *Gamekeepers, and power to search, &c., for game.*

ment for pleasure to the trustee. (*Webb v. Earl of Shaftesbury*, 7 *Ves. Jun.* 488.) In *Calcraft v. Gibbs*, (5 *T. R.* 19,) Lord Kenyon, C. J., said, "that the lord of a manor cannot convey to another the power of appointing a gamekeeper, without a conveyance also of the manor itself. Such a power is a mere emanation of the manor, and it is inseparable from it. It is a mere shadow, accompanying the substance."

Although a gamekeeper has, by virtue of his deputation under s. 13 of the 1 & 2 *Will.* 4, c. 22, (*ante*, p. 757,) power to seize all kinds of dogs, nets, and all other engines and instruments, which are used for the killing and taking of game within the manor by an *uncertificated* person; yet he has only authority to do this at the time the party is using them for that purpose. (*Wingfield v. Stratford*, 1 *Wils.* 315; *R. v. Gardiner*, 2 *Str.* 1098; see *ante*, p. 758.) And before this statute he had no right whatever to seize the game itself in the possession of the party. (*Bird v. Dale*, 7 *Taunt.* 560.) But now, by s. 36, (which see, *post*, p. 777,) a gamekeeper has authority to seize game from trespassers, on their not delivering it up when demanded from them. Before a gamekeeper, however, makes a seizure of a dog or gun, &c. used by a party for killing or taking game, it is advisable that he should demand of him a certificate, &c., according to the directions of the 52 *Geo.* 3, c. 93, schedule (L), rule 11, (*post*, p. 814), and a failure or refusal to comply with such demand will render him liable to the penalty mentioned in that rule. (See *Carpenter v. Adams*, *Comb.* 183.) See *post*, p. 761, as to the power of one gamekeeper to seize the dogs of another gamekeeper.

Whether power to shoot dogs.

In a case which occurred before Lord *Hardwicke*, he held, that as a gamekeeper might lawfully seize the dog of an unqualified person, it did not make any great difference if the gamekeeper shot him; because if anybody suffered, it was the lord of the manor, who lost the benefit of the dog, which should have been secured by the gamekeeper for the lord's use. (*Roy v. Duke of Beaufort*, 2 *Atk.* 190; and see *Kingsnorth v. Bretton*, 5 *Taunt.* 416.)

But it would seem that a gamekeeper cannot shoot the dog of a mere trespasser in pursuit of game, if he have a certificate for the purpose of killing game. If the gamekeeper is justified in doing so, it must be on the ground that the destruction of the dog was absolutely necessary for the preservation of the hare, or other game, which the dog was following. For in a case of this kind which occurred under the former laws, where it did not appear that the owner of the dog was an unqualified person, nor that there was any necessity for killing the dog to save the hare, Lord *Ellenborough* observed, "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground. And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. The gamekeeper had no right to kill the plaintiff's dog for following the hare." (*Vere v. Lord Cawdor*, 11 *East*, 568.) The powers of a gamekeeper, in this respect, are supposed to be inferior to those of a *warrener* or *park-keeper*, who, as we shall presently see, may kill any dog whilst pursuing deer in the park, or rabbits in the warren; because the animals are in those cases considered to be the subjects of property.

Park-keepers empowered to seize guns, &c.

We shall hereafter notice the 29th section of the 24 & 25 *Vict.* c. 96, empowering deer-keepers and their assistants to seize guns, &c. p. 801.

Also the 9 *Geo.* 4, c. 69, s. 2, empowering owners or occupiers of land, lords of manors, and their servants, &c., to apprehend offenders in night poaching, *post*, p. 793.

In *Prothero v. Mathews*, 5 *C. & P.* 581, *Taunton*, J., ruled, that the servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and that the servant may

justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting the dog were all one and the same transaction. (And see *Barrington v. Turner*, 3 Lev. 28.)

So a warrener may kill a dog used to infest the warren, whilst running after the rabbits in the warren. (*Wadhurst v. Damme*, Cro. Jac. 45; *Wright v. Ramscot*, 1 Saund. 84.) In both cases the park or warren must be a strictly legal one, as to which, see *ante*, p. 746.

By s. 17, no game certificate, on which a less duty than 3*l.* 13*s.* 6*d.* (a) is chargeable under the acts relating to game certificates, shall authorise any gamekeeper to sell any game, except on the account and with the written authority of the master whose gamekeeper he is. But any such gamekeeper so selling any game may be proceeded against under the new act, in the same manner as if he had no game certificate whatsoever.

Gamekeeper not authorised to sell game.

The 1 & 2 Will. 4, c. 32, we have seen (*ante*, p. 759), confines the power of a gamekeeper to kill game within the limits of the manor for which he is appointed gamekeeper; and the 6th section (*ante*, p. 753), expressly provides, that if he kill or take game, or use a dog or gun for that purpose, out of the limits of the manor, he may then be proceeded against as any other person who has no certificate. (*Vide ante*, p. 753.)

As to gamekeepers sporting beyond their manors,

It was decided, under the 22 & 23 Car. 2, c. 25, s. 2, that one gamekeeper could not seize the dogs of another, if he trespassed in the manor of which the former was gamekeeper. (*Rogers v. Carter*, 2 Wils. 387.)

A gamekeeper seizing the dog, &c. of another gamekeeper.

If a gamekeeper is guilty of disobedience, or other misbehaviour, he may be discharged without any notice, unless there has been a special agreement to the contrary. (*Moore*, 8, 9.) In like manner, his residence in a house, which he is permitted by the lord of the manor to occupy, merely in consequence of his employment as gamekeeper, is lawful only whilst he is retained in that capacity; and he acquires no right of occupation as tenant. (*Bertie v. Beaumont*, 16 East, 33; *Lit. Rep.* 139; see further, *post*, "Servants.")

Discharging gamekeeper.

For the form of the appointment of a gamekeeper, of a deputation to kill game within a manor, and of the necessary certificate to be taken out by the person so appointed or deputed, see *post*, p. 810.

Form of appointment or deputation.

By the 11 & 12 Vict. c. 29, it is enacted (s. 1), that it shall be lawful for any person, being in the actual occupation of any inclosed lands, or for any owner thereof who has the right of killing game thereon, by himself, or by any person directed or authorised by him in writing, according to the form in the schedule to this act annexed, or to the like effect, so to do, to take, kill, or destroy any hare then being in or upon any such inclosed lands, without the payment of any such duties of assessed taxes as aforesaid, and without the obtaining of an annual game certificate.

11 & 12 Vict. c. 29. Hares may be killed without certificate.

Sect. 2. That no owner or occupier of land as aforesaid shall be authorised to grant or continue, under the provisions of this act, authority to more than one person, at one and the same time, to kill hares upon his land within any one parish; and that he shall deliver the said authority, or a copy thereof, or cause the same to be delivered, to the clerk of the magistrates acting for the petty sessions division within which the said lands are situate, who shall forthwith register the same, and the date of such registration, in a book to be kept by him for such purpose, which book shall be at all reasonable times open to the inspection of the clerk of the commissioners acting in the execution of the acts for assessed taxes, or of any of the collectors of assessed taxes within such district; and the said authority, so soon as

Authority to kill hares to be limited to one person at the same time in any one parish; which authority shall be sent to the clerk of the petty sessions, who shall register the same.

If authority re-

(a) By 23 & 24 Vict. c. 90, new duties are imposed on game certificates.

8. *Certificate, and consequences of omission.*

11 & 12 Vict. c. 29.
voked, notice to be given of the same.

Persons not to be liable to tax on gamekeepers.

To extend to coursing or hunting.

Not to authorise the laying of poison.

Agreements reserving the game to be still in force.

Interpretation of act.

it shall have been registered as aforesaid, shall be held good until after the 1st day of February in the year following that within which the same is granted, unless the same be previously revoked, and notice of such revocation be given to the clerk of the magistrates as aforesaid; and the said registered authority, or the unrevoked register thereof, shall be good and sufficient evidence of the right of the person to whom authority is given by the same to kill hares upon the lands mentioned within the same without having obtained an annual game certificate.

Sect. 3. That no person so directed or authorised to kill any hare as aforesaid shall, unless otherwise chargeable, be liable to any duties of assessed taxes as gamekeeper.

Sect. 4. That it shall be lawful for any person to pursue and kill or to join in the pursuit and killing of any hare by coursing with greyhounds, or by hunting with beagles or other hounds, without having obtained an annual game certificate.

Sect. 5. That nothing herein contained shall extend or be taken or construed to extend to the making it lawful for any person, with intent to destroy or injure any hares or other game, to put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, or for any person to use any fire arms or gun of any description, by night, for the purpose of killing any game or hares.

Sect. 6. That where any tenant of any land for life or lives, years or otherwise, now is or hereafter shall be bound by any agreement not to take, kill, or destroy any game upon any lands included in such agreement, then and in all such cases nothing herein contained shall extend or be taken or construed to extend to authorise or empower such tenant to take, kill, or destroy any hare upon any such lands so included in such agreement, or to authorise any other person to kill or destroy any hare upon any such lands.

Sect. 7. That in the interpretation of this act the singular number shall extend to several persons and things as well as to one person or thing; and any word importing the plural number shall apply to one person or thing as well as to several persons or things; and every word importing the masculine gender only shall extend to a female as well as a male; and that the word "agreement" shall include any covenant, proviso, promise, undertaking, condition, or reservation; and that the word "parish" shall include any hamlet, township, tithing, or extra-parochial place; and for the purposes of this act the word "night" shall be considered and is hereby declared to commence at the expiration of the first hour after sunset and to conclude at the beginning of the last hour before sunrise.

VIII. Certificate to be taken out, and Consequences of Omission.

1 & 2 Will. 4, c. 32,
not to affect exist-
ing laws respect-
ing game certi-
ficates.

It may be as well to premise, that by s. 5 of the 1 & 2 Will. 4, c. 32, nothing in this act contained shall in anywise affect or alter (except as hereinafter mentioned) any act or acts now in force by which any person using any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, are required to obtain and have annual game certificates; but that all persons who, before the commencement of this act, were required to obtain and have such certificates, shall, after the commencement of this act, be required from time to time to obtain and have the like certificates; and all the powers, provisions, and penalties contained in such act or acts shall continue in as full force and effect as if this act had not been made;

and that all regulations and provisions contained in any act or acts relative to game certificates, so far as they relate to gamekeepers of manors, and to the amount of duty for game certificates to be charged upon or in respect of gamekeepers of manors in the cases specified in such act or acts, shall extend and apply to all gamekeepers of lands appointed under this act, as fully and effectually as if they were gamekeepers of manors, and were expressly mentioned in and charged by such act or acts.

And by the 23rd sect. of that act (*ante*, p. 754), no person convicted under the act of killing game without a certificate shall, by reason thereof, be exempted from any penalty or liability under any statute or statutes relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty.

By the 23 & 24 Vict. c. 90, entitled "An Act to repeal the duties on game certificates, and certificates to deal in game, and to impose in lieu thereof duties on excise licences and certificates for the like purposes," the duties in respect of certificates to kill and deal in game as contained in 52 Geo. 3, c. 93; schedule (L.), 56 Geo. 3, c. 56, and 1 & 2 Will. 4, c. 32, were repealed.

Sect. 2. In lieu of the duties hereby repealed there shall be granted charged, and paid for, and upon the several licences and certificates to take or kill game, and licences to deal in game hereinafter mentioned, the respective duties or sums of money hereinafter expressed or denoted; (that is to say),

£ s. d.

For a licence in Great Britain, or a certificate in Ireland, to be taken out by every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer, or shall take or kill by any means whatever, or shall assist in any manner in the taking or killing by any means whatever of any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer:

If such licence or certificate shall be taken out after April 5th, and before 1st of November,

To expire on the 5th of April in the following year	3	0	0
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To expire on the 31st of October in the same year in which the licence or certificate shall be taken out	2	0	0
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If such licence or certificate shall be taken out on or after the 1st of November,

To expire on the 5th day of April following	2	0	0
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Provided always, that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a licence to authorise any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper to kill game upon the same lands, upon payment of the duty of

	2	0	0
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And for every licence to deal in game in England, Scotland, or Ireland, to be granted under this act

	2	0	0
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Sect. 3. The duties by this act granted shall be under the management of the commissioners of Inland Revenue, and shall be deemed to be excise duties, and all the powers, provisions, clauses, regulations, and directions contained in any act relating to excise duties or to penalties under excise acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the duties by this act

8. *Certificate, and consequences of omission.*

1 & 2 Will. 4, c. 32.

The penalty for killing game without a certificate to be cumulative.

23 & 24 Vict. c. 90.

In lieu of duties repealed, the duties herein named to be levied.

Duties granted to be excise duties under the commissioners of Inland Revenue.

8. *Certificate, and consequences of omission.*

23 & 24 Vict. c. 90.

Licence to be taken out for taking or killing game in Great Britain.

Penalty for neglect.

Exceptions and exemptions.

granted, and to the penalties hereby imposed, so far as the same are or may be applicable, and shall be observed, applied, and enforced for and in the collecting, securing, and recovering of the said duties and penalties hereby granted and imposed respectively, and otherwise in relation thereto, so far as the same shall be consistent with and not superseded by the express provisions of this act, as fully and effectually as if the same had been herein repeated and specially enacted in this act with reference to the said last-mentioned duties and penalties respectively.

Sect. 4. Every person, before he shall in Great Britain take, kill, or pursue, or aid or assist in any manner in the taking, killing, or pursuing by any means whatever, or use any dog, gun, net, or other engine for the purpose of taking, killing, or pursuing any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer, shall take out a proper licence to kill game under this act, and pay the duty hereby made payable thereon; and if any person shall do any such act as hereinbefore mentioned in Great Britain without having duly taken out and having in force such licence as aforesaid, he shall forfeit the sum of 20*l.*(a)

Sect. 5. The following exceptions and exemptions from the duties and provisions of this act are hereby made and granted (that is to say):—

Exceptions.

1. The taking of woodcocks and snipes with nets or springs in Great Britain.
2. The taking or destroying of conies in Great Britain by the proprietor of any warren or of any inclosed ground whatever, or by the tenant of lands, either by himself or by his direction or permission.
3. The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds.
4. The pursuing and killing of deer by hunting with hounds.
5. The taking and killing of deer in any inclosed lands by the owner or occupier of such lands, or by his direction or permission.

Exemptions.

1. Any of the royal family.
2. Any person appointed as gamekeeper on behalf of her Majesty by the commissioners of her Majesty's woods, forests, and land revenues, under the authority of any act of parliament relating to the land revenues of the crown.
3. Any person aiding or assisting in the taking or killing of any game, or any woodcock, snipe, quail, landrail, or coney, or any deer, in the company or presence and for the use of another person who shall have duly obtained, according to the directions of this act, and in his own right, a licence to kill game, and who shall by virtue of such licence then and there use his own dog, gun, net, or other engine for the taking or killing of such game, woodcock, snipe, quail, landrail, coney, or deer, and who shall not act therein by virtue of any deputa- tion or appointment.
4. And, as regards the killing of hares only, all persons who, under the provisions of the 11 & 12 Vict. cc. 29 & 30 (b), are authorised to kill hares in England without obtaining an annual game certificate.

(a) Such person is also liable to the penalty of 5*l.* under 1 & 2 Will. 4, c. 32, s. 23, *ante*, p. 754.

(b) Chap. 30 relates to Scotland only.

Sect. 6. Provided always, That nothing herein contained shall extend to repeal, alter, or affect any of the provisions of the 11 & 12 Vict. cc. 29 & 30, further than that the term "game certificate" in the said acts shall be construed to mean a licence to kill game under the provisions of this act, and shall be so read accordingly; and that the term "game certificate" used in 1 & 2 Will. 4, c. 32, shall be construed and read in like manner; and that wherever in the said last-mentioned act the duty of 3*l.* 13*s.* 6*d.* on a game certificate is mentioned, the duty of 3*l.* on a licence to kill game shall be read in lieu.

Sect. 7. Any person having the right to kill game on any lands in England, and being charged or liable to be charged to the assessed tax on servants in respect of any gamekeeper, by whomsoever deputed or appointed, and whether deputed or appointed or not, and any person granting a deputation or appointment in Great Britain to the servant of any other person who shall be duly charged to the assessed tax on servants in respect of such servant, whether as gamekeeper or in any other capacity, with power and authority to take or kill any game, shall respectively be at liberty to take out a licence to kill game on behalf of any such servant, on payment of the duty of 2*l.* for the year ending the 5th day of April, and such licence shall exempt the servant named therein during his continuance in the same capacity and service, and on his quitting such service shall also exempt any servant who shall succeed him in the same service and capacity, or who shall succeed to the deputation of the same manor or royalty or lands within the year for which the licence is granted, during the remainder of such year; and no such servant on whose behalf a licence shall have been duly obtained as aforesaid shall be required to obtain a licence for himself, or be liable to any penalty by reason of not obtaining a licence in his own name.

Sect. 8. Every such licence to kill game taken out on behalf of any such servant as aforesaid shall, upon the revocation of any such deputation or appointment, or on his quitting the service of the master by whom such licence shall have been taken out, be from thenceforth of no further effect as to the person named therein as such servant, or so deputed or appointed as aforesaid; but if within the year for which such licence was granted the said master, on the quitting of such servant, shall employ another servant as gamekeeper in his stead, or the person by whom such deputation or appointment was made shall on the revocation thereof make a new deputation or appointment to any person in his service, or in the service of the same master by whom such licence shall have been taken out, and who shall have been charged or be chargeable to the said assessed tax on servants as aforesaid, the officer by whom such licence was granted, or the proper officer appointed by the commissioners in that behalf, shall renew such licence for the remainder of that year, on behalf of the fresh servant of the person so newly appointed, as the case may be, without payment of any further duty, by indorsing on such licence the name and place of abode of the said last-mentioned servant, or the person to whom such last-mentioned deputation or appointment shall have been granted, and declaring the same to be a renewed licence free of duty.

Sect. 9. Provided always, That no such licence taken out for or on behalf of any person, being such servant or acting under a deputation or appointment as aforesaid, shall be available for such person in any suit or prosecution where proof shall be given of his doing or having done any act for which a licence is required under this act on land on which his master had not a right to kill game.

Sect. 10. If any person shall be discovered doing any act whatever in Great Britain in respect whereof a licence to kill game is

8. *Certificate, and consequences of omission.*

23 & 2 Vict. c. 90.
Nothing herein to alter 11 & 12 Vict. cc. 29 and 30, except that "Game Certificate" in said acts, and also in 1 & 2 Will. 4, c. 32, shall be read as "Licence to kill Game."

Licences may be taken out on behalf of assessed servants acting as gamekeepers for persons having right to kill game, or under deputations from lords of manors.

On change of gamekeeper, or revocation of deputation, licence may be continued to successor.

Such licences not available for acts done out of limits of the manor or lands for which the parties are appointed gamekeepers.

Persons doing any act requiring a licence to kill

8. *Certificate, and consequences of omission.*

23 & 24 Vict. c. 90.
game to produce the same, on demand, or declare their names, places of residence, &c.

Penalty for refusal.

Licence to be void if party be convicted of any offence under 1 & 2 Will. 4, c. 32, or 2 & 3 Will. 4, c. 68.

Commissioners to publish lists of persons licensed to kill game.

Provisions of 1 & 2 Will. 4, c. 32, and 2 & 3 Vict. c. 35, relating to licences to deal in game, to be in force throughout the United Kingdom.

required under this act, by any officer of Inland Revenue, or by any lord or gamekeeper of the manor, royalty, or lands wherein such person shall then be, or by any person having duly taken out a proper licence to kill game under this act, or by the owner, landlord, lessee, or occupier of the land on which such person shall then be, it shall be lawful for such officer or other person aforesaid to demand (a) and require from the person so acting the production of a licence to kill game issued to him; and the person so acting is hereby required to produce such licence to the person so demanding the production thereof, and to permit him to read the same, and (if he shall think fit) to take a copy thereof or of any part thereof; or in case no such licence shall be produced to the person demanding the same as aforesaid, then it shall be lawful for the person having made such demand to require the person so acting forthwith to declare to him his Christian and surname and place of residence, and the place at which he shall have taken out such licence; and if such person shall, after such demand made, wilfully refuse to produce and show a licence to kill game issued to him, or in default thereof as aforesaid to give to the person so demanding the same his Christian and surname and place of residence, and the place at which he shall have taken out such licence, or if he shall produce any false or fictitious licence, or give any false or fictitious name or place, or if he shall refuse to permit any licence which he may produce to be read, or a copy thereof or of any part thereof to be taken, he shall forfeit the sum of 20*l*.

Sect. 11. If any person, having obtained a licence to kill game under this act, shall be convicted of any offence under 1 & 2 Will. 4, c. 32, s. 30, or under 2 & 3 Will. 4, c. 68, the said licence shall thenceforth be null and void.

Sect. 12. The commissioners of Inland Revenue shall, when and as they shall see fit, cause lists of the names and residences of the several persons to or for whom licences to kill game have been granted under this act to be inserted in such newspapers or published in such other manner as to them shall seem proper, distinguishing in such lists the persons acting under any deputation, appointment, or authority from others, and the manors, royalties, or lands for which deputations, appointment, or authorities have been granted, and also distinguishing the rate of duty paid for such licences.

Sect. 13. All the clauses and provisions of the two several acts, 1 & 2 Will. 4, c. 32, and 2 & 3 Vict. c. 35, relating to the granting of licences by justices of the peace to deal in game, and to the holding of special sessions by such justices in their respective divisions of districts for the purpose of granting such licences, and also all the clauses, provisions, and penalties contained in the said acts or either

(a) The penalty imposed on a party hereby for not producing his certificate, does not attach on him by the simple refusal to produce it, unless he also refuse on request to give his Christian and surname, and place of residence, and the parish and place in which he shall have been assessed to the duties on game certificates; for the default of not producing the certificate is done away with, if the party, on being required, communicates these further particulars to the demandant. And a person merely

assisting another is not bound, either to produce his certificate, or to give his name. (*Molton v. Rogers*, 4 *Esp.* 215; *Deac. G. L.* 20.) If the party refuses to tell his Christian name and surname, the person demanding it need not go on to ask in what place, if any, he is assessed to the game duty. (*Scarth v. Gardiner*, 5 *C. & P.* 38.) These cases were decided under the 52 *Geo.* 3, c. 93, *Sch. L.*; but this section is nearly identical with s. 11 of such schedule.

of them relating to dealers in game, and to the selling of game, either by or to such dealers or others, shall, so far as the same are consistent with the express provisions of this act, and as the same are altered or amended by this act, extend to and be of full force and effect in and throughout the whole of the United Kingdom, and shall be observed, applied, and enforced as if the same, so altered or amended and made consistent with the express provisions of this act, had been herein repeated and specially enacted: Provided always, that no person shall be authorised to sell game to any licensed dealer unless he shall have taken out a 3*l*. licence under this act.

Sect. 14. Every person who shall have obtained any licence to deal in game from the justices of the peace, under the provisions of the said two several acts in the preceding clause mentioned, shall annually, and during the continuance of such licence, and before he shall be empowered to deal in game under such licence, obtain a further licence to deal in game under this act, on payment of the duty hereby charged thereon, and if any person obtaining a licence from the said justices as aforesaid shall purchase or sell or otherwise deal in game before he shall obtain a licence to deal in game under the provisions of this act, he shall forfeit the sum of 20*l*.

24 & 25 Vict. c. 91, s. 17. Whereas by the 23 & 24 Vict. c. 90, s. 14, a penalty of 20*l*. is imposed upon any person who shall obtain a licence to deal in game from the justices of the peace under the provisions of certain acts therein referred to, and who shall purchase or sell or otherwise deal in game before he shall obtain a licence to deal in game under the provisions of the act in this clause first mentioned: Be it enacted that the said penalty shall be incurred by every person who, under the provisions of the said acts so referred to as aforesaid, ought to obtain a licence from the justices of the peace to deal in game, and who shall purchase, or sell, or otherwise deal in game before he shall obtain a proper excise licence under the provisions of the said first-mentioned act, whether he shall have obtained a licence from the said justices or not; and in any information exhibited for recovery of the said penalty it shall be sufficient to allege, and upon the trial thereof to prove, that the defendant dealt in game without the licence required by the said first-mentioned act.

Sect. 15. Provided always, That no licence to deal in game shall be granted under the provisions of this act to any person, except upon the production of a licence for the like purpose duly granted to him by the justices of the peace as aforesaid, and then in force; and every officer appointed or authorised to grant licences to deal in game under this act shall in each year make out a list, to be kept in his possession, containing the name and place of abode of every person to whom he shall have granted or issued a licence to deal in game under this act, and such officer shall at all seasonable hours produce such list to any person making application to inspect the same, and shall be entitled to demand and receive for such inspection the sum of 1*s*.

Sect. 16. All licences and certificates to kill game and to deal in game respectively, under the provisions of this act, shall be in such form as the commissioners of Inland Revenue shall from time to time provide in that behalf, and shall denote the amount of duty charged thereon respectively, and shall be granted, signed, and issued at the chief office of Inland Revenue in London, Edinburgh, and Dublin, respectively, and by the several supervisors of excise in their respective districts, or by such other officers of Inland Revenue and at such places as the said commissioners shall think fit to employ and appoint respectively in that behalf; and every such licence shall contain the proper Christian and surname, and place of residence of

8. *Certificate, and consequences of omission.*

23 & 24 Vict. c. 90.

Persons licensed by the justices to deal in game, to pay for and obtain a licence under this act.

24 & 25 Vict. c. 91. Persons dealing in game without excise licence to be liable to penalty whether licensed by the justices or not.

23 & 24 Vict. c. 90. Licences to deal in game under this act to be granted only to those who have obtained licences from the justices.

List of persons licensed to be kept for inspection.

By whom licences shall be granted, and form thereof.

9. *When and how game may be taken and killed, &c.*

23 & 24 Vict. c. 90.

Duration and expiration of licences.

Licences and certificates to be available throughout the United Kingdom.

the person to whom the same shall be granted, with any other particulars which the commissioners of Inland Revenue may direct to be inserted therein, and shall be dated on the day when the same was actually issued, and shall have effect and be in force upon the day of the issuing thereof, and shall expire on the day therein mentioned for the termination thereof.

Sect. 17. 5 & 6 Vict. c. 81, relating to game certificates in Ireland, is to continue in force.

Sect. 18. Every licence and certificate to kill game taken out respectively in Great Britain and Ireland under this act, by or on behalf of any person in his own right, and not as a gamekeeper or servant, shall be available for the killing of game in any part of the United Kingdom.

IX. *When and how Game may be taken and killed, &c.*

1 & 2 Will. 4, c. 32.
Killing game on a Sunday or Christmas-day.

Killing game out of season.

Laying poison to kill game.

By the 1 & 2 Will. 4, c. 32, s. 3, if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game, on a Sunday or Christmas-day, such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction; and if any person whatsoever shall kill or take any *partridge* between the 1st day of February and the 1st day of September in any year, or any *pheasant* between the 1st day of February and the 1st day of October in any year, or any *black game* (except in the county of Somerset or Devon, or in the New Forest in the county of Southampton), between the 10th day of December in any year and the 20th day of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the 10th day of December in any year and the 1st day of September in the succeeding year, or any *grouse*, commonly called *red game*, between the 10th day of December in any year and the 12th day of August in the succeeding year, or any *bustard* between the 1st day of March and the 1st day of September in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every *head* (see *ante*, p. 757) of game so killed or taken such sum of money, not exceeding 1*l.*, as to the said justices shall seem meet, together with the costs of the conviction; and if any person, with intent to destroy or injure any game, shall at any time put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay such sum of money, not exceeding 10*l.*, as to the said justices shall seem meet, together with the costs of the conviction.

A conviction for killing a pheasant contrary to this section followed the form given in s. 1 to 11 & 12 Vict. c. 43, and adjudged the offender to forfeit and pay a penalty, to be paid and applied according to law. The Court of Q. B. 7 *E. & B.* 859, in *Reg. v. Hyde*, held the conviction to be good by virtue of the 11 & 12 Vict. c. 43, ss. 17 & 32.

Possession of game illegal after ten days in dealers, and forty days in other persons, from expiration of season.

Sect. 4. If any person *licensed to deal in game* by virtue of this act as hereinafter mentioned shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of 10 days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, *not being licensed to deal in game* by virtue of this act as hereinafter mentioned, shall buy or sell any bird of game after the expiration of 10

days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control any bird of game (except birds of game kept in a new or breeding place) after the expiration of *forty days* (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction of any such offence before 2 justices of the peace, forfeit and pay for every head (see *ante*, p. 757) of game so bought or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction.

10. *Dealing in game.*

1 & 2 Will. 4, c. 32.

Sale of live birds of game by a licensed game dealer after the expiration of 10 days from the close of the season is an offence within this section. *Loombe v. Bailey*, 30 *L. J. M. C.* 31. See, however, *per Pollock*, C. B., in *Parritt v. Baker*, 20 *Ex.* 759, where that learned judge questions whether this section does not apply to dead game only.

Sect. 24. If any person not having the right of killing the game upon any land, nor having permission from the person having such right, shall wilfully take out of the nest or destroy in the nest upon such land the eggs of any bird of game or of any swan, wild duck, teal or widgeon, or shall knowingly have in his house, shop, possession, or control any such eggs so taken, every such person shall, on conviction thereof before 2 justices of the peace, forfeit and pay for every egg so taken or destroyed, or so found in his house, shop, possession, or control, such sum of money, not exceeding 5*s.*, as to the said justices shall seem meet, together with the costs of the conviction.

Destroying or taking eggs of game, &c.

As to the offence of poaching in the night, see *post*, p. 792.

Night poaching.

X. Dealing in Game.

By the 1 & 2 Will. 4, c. 32, s. 17, every person who shall have obtained an annual game certificate shall have power to sell game to any person licensed to deal in game, according to the provisions hereinafter mentioned: Provided always, that no game certificate on which a less duty than 3*l.* 13*s.* 6*d.* (a) is chargeable under the acts relating to game certificates shall authorise any gamekeeper to sell any game, except on the account and with the written authority of the master whose gamekeeper he is; but that any such gamekeeper selling any game not on the account and with the written authority of such master may be proceeded against under this act in the same manner, to all intents and purposes, as if he had no game certificate whatsoever. (As to which, see s. 25, *post*, p. 770.)

Certificated persons may sell game to licensed dealers.

Proviso as to gamekeepers.

Sect. 18. The justices of the peace of every county, riding, division, liberty, franchise, city, or town shall hold a special session in the division or district for which they usually act, in the present year, between the 15th and the 30th days of October, and in every succeeding year in the month of July (see the 2 & 3 Vict. c. 35, s. 4, *infra*), for the purpose of granting licences to deal in game, of the holding of which session 7 days' notice shall be given to each of the justices acting for such division or district; and the majority of the justices assembled at such session, or at some adjournment thereof, not being less than 2, are hereby authorised (if they shall think fit) to grant, under their hands, to any person being a householder or keeper of a shop or stall within such division or district, and not being an innkeeper or victualler,

Justices to hold special session yearly for granting licences to deal in game.

(a) Now 3*l.* by 23 & 24 Vict. c. 90, s. 6.

10, <i>Dealing in game.</i>	or licensed to sell beer by retail, nor being the owner, guard, or driver of any mail coach, or other vehicle employed in the conveyance of the mails of letters, or of any stage coach, stage waggon, van, or other public conveyance, not being a carrier or higgler, nor being in the employment of any of the above-mentioned persons, a licence according to the form in the schedule (A.) annexed to this act, empowering the person to whom such licence shall be so granted to buy game at any place from any person who may lawfully sell game by virtue of this act, and also to sell the same at one house, shop, or stall only, kept by him; provided that every person, while so licensed to deal in game as aforesaid, shall affix to some part of the outside of the front of his house, shop, or stall, and shall there keep, a board having thereon in clear and legible characters his Christian name and surname, together with the following words (that is to say) " <i>Licensed to deal in Game;</i> " and every such licence granted in the present year shall begin to be in force on the 1st day of November in the present year, and shall continue in force until the 15th of July, 1832, and every such licence granted in any succeeding year shall continue in force for the period of one year next after the granting thereof. See s. 4, <i>ante</i> , p. 768.
1 & 2 Will. 4, c. 32.	
Form of licence.	
Dealer to put up a board on his house.	
Duration of licence.	
Sessions for licence may be held at any time.	But by the 2 & 3 Vict. c. 35, s. 4, after reciting the above stat. 1 & 2 Will. 4, c. 32, that it shall be lawful for the justices of the peace to hold in their respective divisions or districts a special session for the purpose of granting licences to deal in game, not only in the month of July, but also at any time, and from time to time, as often as they shall think fit, after the said month of July in every year; and it shall also be lawful for the majority of the said justices (not being less than 2) assembled at any such session, or at any adjournment thereof, to grant licences to deal in game, in the manner directed by the said last-recited act, and under and subject to the provisions and regulations thereof; provided always, that of the holding of any such special sessions 7 days' notice shall be given to each of the justices acting for the division or district in which such session is intended to be held; provided also, that every licence to deal in game, at whatever time the same hath been or shall be granted, shall continue in force from the granting thereof until the 1st day of July then next following, and no longer, anything in the said last-recited act, or in such licence, to the contrary notwithstanding (<i>a</i>).
Proviso as to partners.	23 & 24 Vict. c. 90, repeals 1 & 2 Will. 4, c. 32, ss. 19, 20, as to dealer's certificate. See also <i>ante</i> , p. 766, as to licences to deal in game. Sect. 21. Persons being in partnership, and carrying on their business at one house, shop, or stall only, shall not be obliged by virtue of this act to take out more than one licence in any one year to authorise them to deal in game at such house, shop, or stall.
Licences when to become void.	Sect. 22. If any person licensed by virtue of this act to deal in game shall during the period of such licence be convicted of any offence whatever against this act, such licence shall thereupon become null and void.
Penalty for selling game without licence, and on certificated persons selling to unlicensed persons (<i>b</i>).	Sect. 25. If any person not having obtained a game certificate (except such person be licensed to deal in game according to this act) shall sell or offer for sale any game to any person whatsoever; or if any person authorised to sell game under this act by virtue of a game certificate shall sell or offer for sale any game to any person whatsoever, except a person licensed to deal in game according to this act; every such offender shall, on conviction of any such offence before 2 justices

(a) As to how justices should act in granting or refusing the licence, and the remedies against them for an improper grant or refusal, see *ante*, "*Alehouse*."

(b) In *Help v. Henister*, (8 B. & C.

553), it was held that a contract for the sale of live pheasants was void, as being in contravention of the 58 Geo. 3, c. 75, and that no property passed to the buyer. But in *Parritt v. Baker*, 10 Ex. 159, a declaration

of the peace, forfeit and pay for every head (a) of game so sold or offered for sale such sum of money, not exceeding 2*l.*, as to the said justices shall seem meet, together with the costs of the conviction.

Sect. 26. If shall be lawful for any innkeeper or tavernkeeper, without any such licence for dealing in game as aforesaid, to sell game for consumption in his own house, such game having been procured from some person licensed to deal in game by virtue of this act, and not otherwise.

Sect. 27. If any person, not being licensed to deal in game according to this act, shall buy any game from any person whatsoever, except from a person licensed to deal in game according to this act, or *bonâ fide* from a person affixing to the outside of the front of his house, shop, or stall, a board purporting to be the board of a person licensed to deal in game, every such offender shall, on conviction thereof before two justices of the peace, forfeit and pay for every head (a) of game so bought such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction.

Sect. 28. If any person being licensed to deal in game according to this act shall buy or obtain any game from any person not authorised to sell game for want of a game certificate, or for want of a licence to deal in game; or if any person being licensed to deal in game according to this act, shall sell or offer for sale any game at his house, shop, or stall, without such board as aforesaid being affixed to some part of the outside of the front of such house, shop, or stall, at the time of such selling or offering for sale, or shall affix or cause to be affixed such board to more than one house, shop, or stall, or shall sell any game, at any place other than his house, shop, or stall where such board shall have been affixed; or if any person not being licensed to deal in game according to this act shall assume or pretend, by affixing such board as aforesaid, or by exhibiting any certificate, or by any other device or pretence, to be a person licensed to deal in game; every such offender being convicted thereof before 2 justices of the peace, shall forfeit and pay such sum of money not exceeding 10*l.*, as to the said justices shall seem meet, together with the costs of the conviction.

Sect. 29. The buying and selling of game by any person or persons employed on the behalf of any licensed dealer in game, and acting in the usual course of his employment, and upon the premises where such dealing is carried on, shall be deemed to be a lawful buying and selling in every case where the same would have been lawful if transacted by such licensed dealer himself: Provided also, that nothing herein contained shall prevent any licensed dealer in game from selling any game which shall have been sent to him to be sold on account of any other licensed dealer in game.

The 5 & 6 Will. 4, c. 20, s. 20, reciting 1 & 2 Will. 4, c. 32, ss. 25 & 27, enacts that every person who shall inform and prosecute or give evidence against any other person or persons for any offence committed or to be committed against any of the said last-recited enactments shall be indemnified, freed, and discharged from all and every penalty and penalties which he or she may have incurred or become liable to under the aforesaid enactments, or any of them, for or by reason of any transaction or dealing which he or she may have had with the person or persons against whom he or she shall so inform and prosecute or give evidence as aforesaid, provided the information or prose-

10. *Dealing in game.*

1 & 2 Will. 4, c. 32.

Exceptions as to innkeepers.

Penalty for buying game, except from licensed dealers.

Penalty on licensed dealers buying game from uncertificated persons;

or selling without a board affixed to house;

or fixing boards to several houses, &c.;

or person not licensed pretending to be licensed, &c.

As to buying and selling game by servants of a licensed dealer.

5 & 6 Will. 4, c. 20.

Indemnity to persons prosecuting for offences committed against the recited enactments.

for a breach of contract in not delivering 8 pheasants in good feather was held to be good, and it was decided that the 1 & 2 Will. 4, c. 32, does not prevent a licensed dealer

from making a contract to deliver live game out of a mew or breeding place at any time of the year.

(a) See *ante*, p. 756.

11. *Trespasses in pursuit of game.*

5 & 6 Will. 4, c. 20.

cution which the person so informing and prosecuting as aforesaid shall have instituted, or upon which the person shall give evidence, shall have been commenced before the institution of any proceedings against him or her for the recovery of any such penalty or penalties which he or she may have incurred or become liable to as aforesaid.

XI. Trespasses in Pursuit of Game.

Trespasses in pursuit of game.

And herein we will notice, 1st, what will amount to a trespass—2ndly, the Remedies for Trespasses—and, 3rdly, the Means of preventing them.

(1.) WHAT A TRESPASS.

(1.) What a trespass.

We have already noticed the rights of persons as to the game upon their own premises, in their own occupation or in the occupation of their tenants: also, the rights of persons as to game as owners of franchises or lords of manors, &c., *ante*, p. 744, &c.

The land of every owner or occupier is enclosed and set apart from that of his neighbour, either by a visible or tangible fence, as one field is separated from another by a hedge, wall, &c., or by an ideal, invisible boundary, existing only in contemplation of law, as when the land of one man adjoins to that of another in the same open or common field. Hence every unwarrantable entry upon the land of another is termed a trespass by breaking his *close*. (2 *Schw. N. P. tit. Trespass*.)

It seems that if a person discharge a gun from the outside of a field into it, so as that the shot strike the soil, he is guilty of breaking and entering the field. (See *Pickering v. Rudd*, 4 *Campb.* 220.) And it seems that an action on the case would lie against the party though the shot did not strike the soil, if the shooting was done maliciously, and with intent to frighten the game from a preserve (*Keeble v. Hickeringill*, 11 *East*, 574, note (a)); though not, if the shooting be to frighten rooks from a rookery, because these birds being considered in law as destructive and noyful fowl, and not known as an article of food, it is held that a party can have no property in them in their wild state, nor show any absolute right to have them resort to his trees. (*Hannam v. Mockett*, 2 *B. & C.* 934.)

If A. gives B. leave to go on a field, in which A. has no right, and B. goes there, this will not make A. liable as a co-trespasser with B.; but if A. orders and authorises B. to go on the field, and he does so, A. is a joint trespasser with B.; the latter being an authority, the former a leave and license only. (*Robinson v. Vaughton*, 8 *C. & P.* 252.)

Pursuing game.

In general no man can come upon another's close to kill or take game without being liable to an action of trespass. (2 *Bac. Ab.* 613; 2 *Bla. Com.* 417; 2 *Bla. Rep.* 900.) And in general no person, though he find game upon his own land, has a right to pursue, nor can he justify pursuing it into the land of another, either to kill or take it when killed, or for any other purpose. (*Deane v. Clayton*, 7 *Taunt.* 489. And in *Baker v. Berkeley*, 3 *C. & P.* 32, it was held that if a stag, hunted by the hounds of B., run into the barn of A., B. and his servants have no right to enter the barn to take the stag; and if they do, they are trespassers.)

In *Osmond v. Meadows*, 31 *L. J. M. C.* 238, it was held that if a person standing upon his own land shoots game upon another's land, it is an act of trespass within 1 & 2 Will. 4, c. 32, s. 30, to go on such other person's land to pick up the game so shot; and in *Kenyon v. Hart*, 34 *L. J. M. C.* 87, it was held not to be an act of trespass within 1 & 2 Will. 4, c. 32, s. 30, to pick up dead game on another person's land, which had been found on the person's own land, and shot after it had crossed the boundary.

Pursuing beasts

The common law allows persons to enter the lands of others to follow

beasts of prey, as a fox or a badger, for the purpose of destroying them as such, for the destruction of them is to the public benefit. (*Gundry v. Feltham*, 1 T. R. 334.) But the digging and breaking the ground to unearth them is held to be unlawful, and the owner of the ground may maintain an action of trespass in that case. (*Cro. Jac.* 321.) With respect to the case of *Gundry v. Feltham*, Mr. *Christian* observes, that the judgment was only justified by the pleadings, which admitted that the riding after the fox, in that case, was the only means of killing it. (*Christian's G. L.* 114.) But in the case of *The Earl of Essex v. Capel*, at Hertford Sum. Ass. 1809, where the subject was properly pleaded upon the record, Lord *Ellenborough*, C. J. directed the jury to find for the plaintiff, if they thought from the evidence that the defendant pursued the fox for *his own pleasure and amusement*, and if they thought the good of the public was not his sole governing motive. (*Christian's G. L.* 114.)

A person whose game is enticed away from his land by a neighbour is not justified in exploding combustibles, or doing other acts to frighten away the game from the land to which it is enticed, and thus preventing the game being shot there. (*Ibbotson v. Peat*, 3 H. & C. 644; *Carrington v. Taylor*, 11 East, 571, recognised.)

As to the provisions against trespassers, in the 1 & 2 Will. 4, not applying to persons hunting, &c. see *post*, p. 777.

As to who is entitled to enter upon land and to kill game, and particularly as to a landlord's right to do so, see *ante*, p. 753, &c.

As to trespassing on a highway in pursuit of game, see *post*, p. 775.

(2). THE REMEDIES FOR TRESPASSES.

The remedies for trespasses in pursuit of game may be by proceedings under the 1 & 2 Will. 4, c. 32, by action of trespass, by action on a bond or agreement, &c., by suit in equity, or by indictment (*a*).

Remedies for Trespasses under the 1 & 2 Will. 4, c. 32.—By s. 30, reciting that after the commencement of this act, game will become an article which may “be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers;” it therefore enacts, that if any person whatsoever shall commit any trespass by entering or being, in the day-time (*b*), upon any land in search or pursuit (*c*) of game or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction; and that if any persons to the number of five or more together shall commit any trespass, by entering or being, in the day-time, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justice shall seem meet, together with the costs of the conviction.

Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and

11. *Trespasses in pursuit of game.*

of prey, as foxes, &c.

Landlord's right to enter on land of tenant, &c.

On highways.

(2.) Remedies for trespasses.

Trespassing in day-time upon lands in search of game (*b*).

Five or more persons committing trespasses.

Party may set up same defence as to an action.

(*a*) The Malicious Trespass Act, 24 & 25 Vict. c. 91, s. 52, for the summary punishment of malicious trespassers, and giving a magistrate power to award 5*l.* satisfaction (see “*Malicious Injuries to Property*”), exempts persons committing trespasses not wilful and malicious in

hunting, fishing, or in the pursuit of game.

(*b*) See what is to be deemed day-time for the purposes of this act, *post*, sect. 34, p. 776.

(*c*) As to what is sufficient evidence of this, see *ante*, pp. 754 and 772.

11. *Trespasses in pursuit of game.*

Where the occupier, not being entitled to the game, allows another to kill it, party entitled to the game may enforce penalty.

except that the leave and license of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license; and that the lord or steward of the crown of any manor, lordship or royalty, or reputed manor, lordship, or royalty, shall be deemed to be the legal occupier of the land of the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty.

The jurisdiction of justices under this section ceases upon a *bonâ fide* claim of title being made by the party charged (*Legg v. Pardoe*, 9 C. B. N. S. 289); but the justices ought to be satisfied that the accused puts forth an honest claim of right, such as would be a defence to an action of trespass (*Q. v. Cridland*, 27 L. J. M. C. 28; *Legg v. Pardoe*, 30 L. J. M. C. 108), for he cannot oust the jurisdiction by the assertion of a general or illusory claim of right, which would be no defence in an action of trespass (*Cureton v. Reg.*, 30 L. J. M. C. 149), although the party really believed that he had, in common with every one else, the right he professed to claim (*Leath v. Vise*, 30 L. J. M. C. 207); nor can he oust their jurisdiction by disputing the title of the person alleged in the information to be the owner of the land, unless he sets up a *bonâ fide* claim of title in himself or in some one else. (*Cornwell v. Sanders*, 32 L. J. M. C. 6.)

Again, it is no defence under this section that the defendant believed himself to be no trespasser, and was not conscious he was doing wrong, for he is bound to take care that he obtains the proper leave from those qualified to give it, and if he chooses to risk it he must suffer the penalty, if it be sought to be enforced. The justices are to judge whether or no the claim of right set up by a defendant is *bonâ fide* or not. (*Reg. v. JJ. of Derbyshire*, 11 W. R. 780.) Neither the tenant of a farm nor those employed by him can be convicted of trespassing in pursuit of game under this section when they kill rabbits upon the farm, the right of sporting being reserved to the landlord (*Spicer v. Barnard*, 28 L. J. M. C. 176), because by 1 & 2 Will. 4, c. 32, s. 12, the tenant had the power to kill rabbits on the farm, and what he was himself entitled to do he might employ others to do for him. Nor can a labourer be convicted under this section for trespassing in pursuit of rabbits when he kills one on his master's farm by the permission of his master, to whom the right of sporting over the farm was given by his landlord. (*Padwick v. King*, 29 L. J. M. C. 42.)

The 30th section of 1 & 2 Will. 4, c. 32, which makes it an offence to "commit a trespass by entering or being in the daytime upon any land in search of game," does not apply to a case where the game alleged to be searched for was dead at the time. In *Kenton v. Hart*, 34 L. J. M. C. 87, the respondent was shooting upon his own land, when a pheasant rose and flew across the fence which divided it from the land of T. After it had crossed the boundary, the respondent fired at and killed it. It fell upon the land of T., and the respondent went over while it lay dead upon the ground and brought it away. Upon an information laid against him for committing a trespass by being upon the land of T. "in search of game," the justices dismissed the charge, on the ground that the mere act of entering the land for the purpose of picking up the pheasant, which was then dead, was not such a trespass as was contemplated by the act. Held, distinguishing *Osmond v. Meadows*, ante, p. 772, that the justices were right in refusing to convict.

In support of an information, under the 11 Vict. c. 43, s. 5, against

A. for aiding and abetting B. to commit the offence of trespass in pursuit of game, there was evidence that A. drove B. in a conveyance along a turnpike road for a lawful purpose; that the conveyance was afterwards stopped, when B. got out and entered a field and shot a hare, which he gave to A. on returning to the conveyance, and A. then drove along the road. Held, that there was evidence on which the justices might find A. guilty of the offence so charged. (*Stacey v. Whitehurst*, 34 L. J. C. P. 94.)

Entering and being on the land constitute only one offence under this enactment. (*R. v. Mellor*, 2 Dowl. 173; see *Newman v. Bendyshe*, 10 A. & E. 11.)

A party may be a trespasser within the meaning of this enactment, by entering or being upon a highway in search or pursuit of game; as the public have only the right of using a highway for the purpose of passing and re-passing along it, and if they use it for any other purpose, they become trespassers. Firing at game from a highway is a trespass in pursuit of game within 1 & 2 Will. 4, c. 32, s. 30, *Mayhew v. Wardley*, 14 C. B. N. S. 550, and in *Reg. v. Pratt*, 24 L. J. M. C. 113, the court held that the defendant was rightly convicted under this section, where it was proved that whilst on a highway with a gun he had sent a dog into an adjoining cover, out of which a pheasant had immediately flown across the highway, at which he had fired. (*Vide post*, title "Highway"); and the enactment is not confined to trespasses upon inclosed land, but extends to trespasses upon any land in search or pursuit of game, &c. And *a fortiori* the enactment extends to trespassers upon the waste land at the side of a highway. In whom the soil of a highway is vested, and to whom the waste land at the side of a highway belongs, see *post*, title "Highway."

But it would seem that if a party outside of a field fire at game, &c., so as that the shot strike the soil of such field, he is not liable to be convicted under the above section as a trespasser therein in pursuit of game, &c. as the enactment does not extend to a constructive entry. (*Reg. v. Pratt*, 24 L. J. M. C. 113, and *ante*, p. 772.) That a party for such an act would be liable to an action of trespass, *vide ante*, p. 772.

The information under this enactment may be laid by any person though he be not interested in the game upon the land trespassed on, or in the land. (*Midleton v. Gale*, 8 A. & E. 155; *Marden v. Porter*, 29 L. J. M. C. 213.)

Parol evidence of what a party says before a magistrate, on the hearing of a case of trespass under the above section, is admissible, although, in fact, what he said was taken down; as this is not one of the cases in which it is the magistrate's duty to take down what is said before him. (*Robinson v. Vaughton*, 8 C. & P. 252.)

The place where the trespass was committed should, it would seem, be described in the conviction by name, abutments, or occupation. (See *Rex v. Ridley*, R. R. C. C. 515, *post*, p. 798.) Where the conviction described the land as "certain land in the parish of Stoke-upon-Trent, in the county aforesaid, in the possession and occupation of Daniel Bird Baddeley," *Taunton*, J., held that the description was sufficient. (*Reg. v. Mellor*, 2 Dowl. 173.)

A conviction under this enactment is irremovable, notwithstanding the 5 & 6 Will. 4, c. 20, s. 21, *post*, p. 788. (See *R. v. Hester*, 4 Dowl. 589.)

Sect. 31. Where any person shall be found on any land, or upon any of his Majesty's forests, parks, chases, or warrens, in the day-time, (see *post*, p. 777), in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise as hereinbefore mentioned, or for the occupier of the land, (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for

11. *Trespasses in pursuit of game.*

Entering and being on land but one offence under this section

A party in pursuit of game on a highway may be a trespasser under it.

But a party by firing into a field cannot.

Information under it, by whom may be laid.

Evidence of what the party says on hearing of the case.

Description of place in the proceedings.

Conviction not removable.

Trespassers after game may be required to quit the land, and tell their names and abodes, and if they refuse may be arrested.

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in pursuit of
game.*

1 & 2 Will. 4, c. 32.

Penalty for.

Party arrested
must be dis-
charged, unless
brought before a
justice within
twelve hours.

Trespassers armed
using violence, &c.

Trespass in day-
time in queen's
forests.

What to be deemed
day-time.

any person authorised by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his Christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring as aforesaid, and also for any person acting by his order and in his aid, to apprehend such offender, and to convey him or cause him to be conveyed as soon as conveniently may be before a justice of the peace; and such offender, (whether so apprehended or not), upon being convicted of any such offence before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the convicting justice shall seem meet, together with the costs of the conviction. Provided always, that no person so apprehended shall, on any pretence whatsoever, be detained for a longer period than 12 hours from the time of his apprehension until he shall be brought before some justice of the peace; and that if he cannot, on account of the absence or distance of the residence of any such justice of the peace, or owing to any other reasonable cause, be brought before a justice of the peace within such 12 hours as aforesaid, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions hereinafter mentioned, as if no such apprehension had taken place. (See *Cooke v. Wordwards*, *post*, p. 777.)

To justify the apprehension of a person under this section, he must have been required to quit the land, and tell his name; and the "wilfully continuing or returning upon the land," to justify the apprehension, must be upon the same land, and for the purpose of pursuing game there. (*Rex v. Long*, 7 C. & P. 314, *per Williams*, J.)

Sect. 32. Where any persons, to the number of 5 or more together, shall be found on any land, or in any of his Majesty's forests, parks, chases, or warrens, in the day-time, (*vide infra*), in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, any of such persons being then and there armed with a gun, and such persons or any of them shall then and there, by violence, intimidation, or menace, prevent or endeavour to prevent any person authorised as hereinbefore mentioned from approaching such person so found, or any of them, for the purpose of requiring them or any of them to quit the land whereon they shall be so found, or to tell their or his Christian name, surname, or place of abode respectively, as hereinbefore mentioned, every person so offending by such violence, intimidation, or menace as aforesaid, and every person then and there aiding or abetting such offender, shall, upon being convicted thereof before two justices of the peace, forfeit and pay for every such offence such penalty, not exceeding 5*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction; which said penalty shall be in addition to and independent of any other penalty to which any such person may be liable for any other offence against this act.

Sect. 33. If any person whatsoever shall commit any trespass, by entering or being, in the day-time, upon any of his Majesty's forests, parks, chases, or warrens, in search or pursuit of game, without being first duly authorised so to do, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction.

Sect. 34. For the purposes of this act the day-time shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.

Sect. 35. The aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds and being in fresh pursuit of any deer, hare, or fox already started upon any other land (*ante*, p. 772), nor to any person *bond fide* [see "*Conviction*,"] claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor to any lord or any steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty.

Sect. 36. When any person shall be found by day or by night upon any land, or in any of his Majesty's forests, parks, chases, or warrens, in search or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned, or for the occupier of such land, (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any officer as aforesaid of such forest, park, chase, or warren, or for any person acting by the order and in aid of any of the said several persons, to demand from the person so found such game in his possession, and in case such person shall not immediately deliver up such game, to seize and take the same from him, for the use of the person entitled to the game upon such land, forest, park, chase, or warren.

By this provision, it seems that the owner, &c., may seize all the game in the trespasser's possession, whether killed on the land or not. (See *ante*, p. 743.)

The demand must be made on the party while he is on the land.

If he resist the delivery up of the game and use force, force may be opposed to him, but no more force should be used than is requisite to compel the delivery up of the game. (See *Wisdom v. Hodson*, 3 *Tyrv.* 811; and title "*Assault*,")

Mr. Baron *Parke*, in one case, stated it to be his opinion, that a person, who was the son of the owner and occupier of certain land, and who had a general authority from his own father to shoot the game upon it, and keep off trespassers, had no authority to demand game upon it under this section;—that the words "having the right of killing the game" in this section mean having the legal right so to do, and therefore that a party who has merely a licence or permission to shoot the game is not within the enactment; and that a person could not be said to be acting in "aid of any of the said several persons," unless he was acting in the actual presence of such person. The case ultimately was decided upon grounds different from the above. (*Cooke v. Woodward*, *cor. Parke*, B. Herts. Sum. Assizes, 1843. *Ex re Marsh*, who was one of the counsel for the plaintiff.)

Sect. 46. Nothing in this act contained shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance, or with whose concurrence or assent, such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence under the general issue.

Where A. authorised B. to sport over the lands of C., which he did, D., by the assent of C., laid an information before a magistrate against B. for the trespass, under the above section, and the magistrate dis-

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1 & 2 Will. 4, c. 32.

The provisions as to trespassers not to apply to persons hunting, &c.

Game may be taken from trespassers not delivering up same when demanded.

Act not to preclude actions for trespass, but no double proceedings for the same trespass.

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in pursuit of
game.*

25 & 26 Vict. c. 114.

Interpretation of
terms.

Power to con-
stable to search
persons, without
warrant, in cer-
tain cases.

missed the complaint; it was held, in an action by C. against A. and B., for this trespass, that the proceedings before the magistrate were a bar to the action, both as to A. and B., under the above section; and that, to be a bar, it was not necessary that the magistrate should convict of the trespass, it being sufficient if he adjudicated between the parties. (*Robinson v. Vaughton*, 8 C. & P. 252.)

The 25 & 26 Vict. c. 114, intituled, "An Act for the Prevention of Poaching," enacts:—

Sect. 1. The word "Game" in this act shall for all the purposes of this act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and the words "Justice" and "Justices" in this act shall, unless otherwise provided for, mean respectively a justice and justices of the peace respectively of or for the county, riding, division, liberty, city, borough, or place, in which any game, gun, part of gun, net, snare, or engine after mentioned shall be found.

Sect. 2. It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search (a) any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before 2 justices of the peace assembled in petty sessions, as provided in the 18 & 19 Vict. c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any 2 justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l.*, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized.

Under this section the justices may convict if there be sufficient evidence for a jury upon which they could convict, and it is not necessary to prove that the person charged was actually seen on the land, for they may draw such inferences from the circumstantial evidence as any other tribunal might. (*Browne v. Turner*, 32 L. J. M. C. 106.) Thus in *Evans v. Botterill*, 33 L. J. M. C. 50, it was held that justices were justified in convicting persons who were found together on a

(a) An actual search is not necessary to lay a foundation for the right to apply for a summons and obtain a

conviction under this section. *Hart v. Knox*, 33 L. J. M. C. 1.

highway at 6 A. M., having in their possession a hare, rabbits, stakes and nets, although there was no direct evidence that any of the defendants had been upon any lands or used any nets. This section does not enable a policeman to apprehend persons whom he may suspect of coming from land where they have been unlawfully in pursuit of game, nor is he justified in stopping and searching a cart upon a highway, unless he has good cause to suspect that the cart is carrying game which has been unlawfully obtained. (*Reg. v. Spencer*, 3 F. & F. 587.)

Sect. 3. Any penalty under this act shall be recovered and enforced in England in the same manner as penalties under the act 1 & 2 Will. 4, c. 32, and in Scotland under the act 2 & 3 Will. 4, c. 68, and in Ireland under the Petty Sessions, Ireland, Act, 1851, when not otherwise directed in this act.

Sect. 4. The powers and provisions of the act of the 11 & 12 Vict. c. 43, shall extend and apply to this act, and to all proceedings, matters, and things to be taken, had, and done, and to all persons to be proceeded against or taking proceedings under this act.

Sect. 5. No conviction or order made under this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Sect. 6. Any person who shall think himself aggrieved by any such summary conviction may appeal to the next court of general or quarter sessions which shall be holden not less than 12 days after the day of such conviction for the county, riding, division, or borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within 3 days after such conviction, and 7 clear days at the least before such sessions, and shall, within 3 days, enter into a recognizance, or bond of caution in Scotland, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and the court at such sessions shall hear and determine the matter of appeal, and shall make such order therein, with or without costs, to either party, as to the court shall seem fit, and shall, if necessary, issue process for enforcing such judgment.

Remedy by Action of Trespass, &c.—If a person commit a trespass by entering the close of another, he becomes subject to an action of trespass. (2 *Bac. Ab.* 613; 2 *Bla. Com.* 117.)

For such a mere trespass, however, a party should be cautious before bringing an action; as in some cases he cannot recover his costs, if the verdict do not amount to 40s. By the 3 & 4 Vict. c. 24, s. 2, after repealing the 43 Eliz. c. 6, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the 22 & 23 Car. 2, c. 9, as relates to costs in personal actions, it is enacted, "that if the plaintiff in any action of trespass or of trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or in the court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of

11. *Trespasses in pursuit of game.*

25 & 26 Vict. c. 114.

Recovery of penalties.

Provisions of 11 & 12 Vict. c. 43, extended to this act.

No conviction shall be quashed for want of form or removed by certiorari.

Power of appeal.

Remedy for a trespass by action, &c.

Costs.

Where damages under 40s.

11. *Trespasses in pursuit of game.*

3 & 4 Vict. c. 24.

Proviso as to notice not to trespass.

Certificate to deprive plaintiff of costs.

Costs after notice not to trespass.

Damages in general.

the record, or on the writ of trial or writ of inquiry, *that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious* (a).

Sect. 3. Provided that nothing herein contained shall extend to or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed or known place of abode of the defendant or defendants in such action or actions.

It has been held under this act, that the granting of the certificate is entirely a matter for the discretion of the judge presiding at the trial. (*Shuttleworth v. Cocker*, 1 *Man. & Gr.* 829; *Barker v. Hollier*, 8 *M. & W.* 513)—that the court cannot review his decision (*Id.*; *Richardson v. Barnes*, 4 *Ex.* 128)—that the certificate ought to be the simple result of his impression upon the facts proved, uninfluenced by any extraneous matter, or any expression of understanding on the part of the jury that the verdict would carry costs (*Pryme v. Browne*, 4 *Scott, N. R.* 739)—that the certificate must be granted immediately, that is to say, within a reasonable time after the trial (*Thompson v. Gibson*, 8 *M. & W.* 281; *Page v. Pearce*, 8 *M. & W.* 677; *Gillett v. Green*, 7 *M. & W.* 347; *Shuttleworth v. Cocker*, *supra*; and see this case as to the amendment of an informal certificate); and that the certificate need not be signed *sedente curiâ* (*Thompson v. Gibson*, *supra*).

If an action be brought for a trespass committed, after notice not to trespass, there is no necessity for the judge to certify, in order to enable the plaintiff to recover his costs, although he recover less than 40s. damages, as the case is then within the 3rd section of the above statute. (See *Bourne v. Alcock*, 5 *Jur.* 660; and 7 *Jur.* 553.) For this reason, independent of others, it is advisable, before bringing an action against a party for trespassing in pursuit of game, to give him a notice not to trespass.

Such notice should be given by or on behalf of the owner or occupier of the land, and should be in writing. The notice had better be explicit, showing where the party must not trespass. (See *Bourne v. Alcock*, *supra*.) A general printed notice stuck up, purporting to be a notice that "The Stanmore Association" would prosecute all persons trespassing, but not signed by the plaintiff, nor addressed to the defendant, was held not a sufficient notice not to trespass. (*Sellon v. Huntsmen of Berkeley Hunt*, *Chit. G. L.* 2nd ed. 229. See *Deac. G. L.* 198, 199.) The notice may be personally served upon the party to whom it is directed, or left for him at his last reputed or known place of abode.

The amount of the damages to be given in an action must depend on the nature of the case submitted to the jury. In trespass for breaking and entering the plaintiff's closes and sporting there, under circumstances of aggravation, the jury gave 500*l.* damages, the court refused to set aside the verdict. (*Merest v. Harvey*, 5 *Taunt.* 442.) This was an action of trespass for breaking and entering the plaintiff's closes, and with dogs and guns beating and hunting for game. The defendant suffered judgment to go by default, the damages to be assessed before a judge of assize, and which were assessed accordingly before *Heath, J.*, at Thetford Spring Assizes, 1814, to the amount of 500*l.*, being the

(a) These words import personal malice and ill-will to the plaintiff. (*Foster v. Pointer*, 8 *M. & W.* 395.)

extent of the damages laid in the declaration. On motion for a rule to set aside the verdict, on the ground of excessive damages, *Heath, J.*, briefly stated the circumstances, which were that the defendant, who was a magistrate, had committed a trespass before the plaintiff's face, in defiance of the plaintiff's notice; that he was a trespasser, and accompanying the injury by every kind of insult and aggravation. *Gibbs, C. J.*, said, "When a man disregards the conduct and principles of a gentleman and of a magistrate, what is to prevent the repetition of such conduct but large damages? What should we say to a man in any inferior station in life, who should so conduct himself? I know not on what principle we could grant a rule in this case, except on the ground that the jury should only have found to the amount of the actual pecuniary damage sustained by the plaintiff. Suppose I had a walk before my house, which I had a pleasure in looking at or in walking upon, should it be allowed that a man should walk there to my annoyance, and then offer me a halfpenny in satisfaction, alleging that I had received no actual damage? This is a much stronger case, for no conduct could have been more outrageous than that of the defendant on this occasion." *Heath*,—"I left it to the jury to say what damages would be a compensation, and it never can be contended that these were too much. I remember a case, many years ago, where the jury gave 500*l.* for merely throwing off a man's hat, and the court refused to set aside the verdict." *Per Curiam*. Rule refused.

11. *Trespasses in pursuit of game.*

In *Hume v. Oldacre* (1 *Stark*. 551), it was held, that the jury might give damages not only in respect of the huntsman's own individual trespass, but for the damages done by his followers. And again in *Baker v. Berkeley* (3 *C. & P.* 32), in trespass for breaking into plaintiff's farm, &c., where the plaintiff received 100*l.* damages, Lord *Tenterden, C. J.* said, "If a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, *although he does not himself go on the lands of another*, but those gentlemen do, he is answerable for the trespass they commit in so doing, *unless* he distinctly desires them not to go on those grounds; and if (as in the present case) he does not so desire them, I think he is answerable, in point of law, for the damage they do." (See *ante*, p. 777.)

Damages by followers.

Remedy by Action on a Bond or Agreement, &c.—The owner of land may take a bond to prevent the commission of trespass thereon. (*Roy v. Duke of Beaufort*, 2 *Atk.* 190). And the tenant may be restrained by bond or covenant from sporting, and the landlord may make his tenant stipulate to bring actions against trespassers. (*Id.*) A court of equity will restrain an improper use of such a covenant.

Remedy by action on bond or agreement.

Remedy by Suit in Equity.—A court of equity will, in some cases, interfere to prevent a repetition of trespasses. (*Ld. Teynham v. Herbert*, 2 *Atk.* 483. See further, *Chit. G. L.* 224, 225.)

Remedy by suit in equity.

Remedy by Indictment, &c.—No indictment can be supported for a mere civil trespass. (*R. v. Storr*, 3 *Burr.* 1701; *R. v. Wilson*, 8 *T. R.* 357). Nor will it lie for a conspiracy to commit a civil trespass on property, by agreeing to go into another's preserve to snare hares, though done in the night by defendants armed with offensive weapons to resist any endeavours to apprehend them. (*R. v. Turner*, 13 *East*, 228; *R. v. Marshall*, 2 *Keb.* 594; see *R. v. Kenrick*, 7 *Jur.* 848.)

Remedy by indictment, &c.

A party cannot be imprisoned for a mere trespass. (*Ante*, "Arrest.") But the 1 & 2 *Will.* 4, c. 32 in some cases allows an arrest of a trespasser. (*Ante*, p. 776.)

As to the indictment for night poaching, see *post*, p. 798.

11. *Trespasses in pursuit of game.*

(3.) Mode of preventing trespass.

Resisting entry or forcing off land.

(3.) THE MODE OF PREVENTING TRESPASSES.

If a person attempt to enter by force the property of another, he may be opposed in such attempt by force. (*Weaver v. Bush*, 8 T. R. 78.) In the case of *Holt v. Wilkes* (3 B. & Ald. 304), *Best*, J., said, "Every proprietor of property is allowed to use the force that is absolutely necessary to vindicate it. If he uses more force than is absolutely necessary, he renders himself responsible for all the consequences of the excess. Thus if a man comes on my land, I cannot lay hands on him to remove him off until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him, but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in aid other assistance. I am speaking of out-door felony, and of cases in which no felony is to be apprehended. It is evident also that this doctrine is applicable only to trespasses committed in the presence of the owner of the property trespassed on."

Seizing, &c. dogs, &c.

The owner of land cannot in general seize a dog which is pursuing game (*Athel v. Corbett*, Cro. Jac. 463); nor can he shoot it. (*Vere v. Lord Cawdor*, 11 East, 568; *Carpenter v. Adams*, Comb. 183; see *ante*, p. 760.) But a different rule prevails with respect to privileged places, such as ancient parks and warrens. Thus, in trespass for killing a mastiff, the defendant may justify that the mastiff infested a warren, and could not be restrained from doing damage there; and it is not necessary to allege, that the defendant could not otherwise prevent the dog from killing the conies; but it is sufficient to state that the dog was in the warren pursuing the conies, and therefore the defendant killed him. (*Wadhurst v. Damme*, Cro. Jac. 44.) And so it is, if a dog runs after deer in an ancient park. (*Barrington v. Turner*, 3 Lev. 28; 1 Saund. 84, n. 3; and see *Rotheroe v. Matthews*, 5 C. & P. 581; and *ante*, p. 760.) And see *ante*, pp. 749 and 760, as to the power of a lord of a manor or his gamekeeper to seize or kill dogs.

Setting spears.

In the case of *Dean v. Clayton* (7 Taunt. 489), the judges of the Court of Common Pleas were equally divided in opinion whether a private person has a right to set dog-spears to preserve hares in his woods, and prevent them from being killed by dogs and foxes.

But the setting of dog-spears is not an illegal act, unless, perhaps, they be set with the intent to do grievous bodily harm to human beings (*vide post*, p. 783); and a person passing with a dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood, for the death of, or injury to his dog, who by reason of his own natural instinct, and against the will of his master runs off the path against one of the dog-spears, and is killed or injured. (*Jordin v. Crump*, 8 M. & W. 782.) And it seems that even if the owner of a dog have no notice of dog-spears being set in a wood, he would not in such a case as the above have any right of action. (*Id.*)

Setting dog-traps.

But if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps; and in consequence of such act his neighbour's dogs be so attracted, and thereby injured, an action on the case lies. (*Townsend v. Wathen*, 9 East, 277.) In an action for placing traps baited with flesh and strong-scented articles, by which the plaintiff's dogs were enticed from the public highways to the said traps, and were caught therein and wounded, there was a verdict for the plaintiff; and the Court of King's Bench refused to arrest the judgment, there being no doubt but the action was maintainable. A rule *nisi* was, however, granted for setting aside the verdict, as against the evidence; and after hearing the grounds of objection against it, Lord *Ellenborough*, C. J.,

said, "It appears by the evidence reported, that the traps were placed so near the plaintiff's court-yard, where his dogs were kept, that they might scent the bait, without committing any trespass on the defendant's wood. Every man must be taken to contemplate the probable consequences of the act he does; and therefore when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs coming accidentally within the sphere of attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction, and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct, which he cannot resist, and putting him there by manual force? If a man knowingly keep a dog accustomed to bite, and any person coming by chance in his way be bitten, an action lies against the owner, though he had no malice against the particular individual. [See title "*Dogs*."] Here there is evidence that the defendant's purpose in setting the traps was to catch dogs in general, as well as vermin; for he afterwards recompensed his servant for dogs taken in the traps. The rule, therefore, *omnis rati habitio retro trahitur et mandato cequiparatur*, applies to this case. Without, therefore, considering what had happened before the plaintiff came to his residence in the defendant's neighbourhood, when he did come, he came to a place where the mischief existed and continued to operate within the sphere where he might lawfully have his dogs, and which in fact did afterwards operate upon them to the plaintiff's prejudice." The other judges agreeing, the rule was discharged. (*Id.*)

11. *Trespasses in pursuit of game.*

Before the statute 7 & 8 Geo. 4, c. 18, it was undecided whether a person might set spring-guns in woods or inclosed grounds; but now the 24 & 25 Vict. c. 100, s. 31, enacts, "That whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, shall be guilty of a misdemeanor, and is liable on conviction to be kept in penal servitude for 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour."

Setting of spring-guns prohibited (*a*).

And by the same section it is enacted "That whosoever shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine as aforesaid, which may have been set, fixed, or left, in any place, then being in or afterwards coming into his possession or occupation, by some other person, to continue so set or fixed, shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid."

Made a misdemeanor.

Provided that "Nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or cause or continued to be set or placed in a dwelling-house for the protection thereof."

Persons permitting guns, traps, &c. set by others, to continue, deemed to have set them.

Provided that "Nothing in this section contained shall extend to make it illegal to set any gin or trap such as may have been or may be usually set with the intent of destroying vermin."

Proviso for guns set in a dwelling-house.

And for traps for vermin.

The setting of a dog-spear is not prohibited by this statute (*Jordin*

Setting dog-spears.

(*a*) This is taken from the 7 & 8 Geo. 4, c. 18, repealed by 24 & 25 Vict. c. 95.

13. *Recovery and application of penalties, &c.*

v. *Crump*, 8 M. & W. 782), unless, perhaps, it be set with the intent to do grievous bodily harm to human beings. (*Id.*)

XII. Soldiers Sporting, &c.

Soldiers sporting.
Provisions under
the Mutiny Act.

In order for better preserving of game and fish, in or near places where officers in the army may be quartered, the annual Mutiny Act always contains a clause enacting, "That every officer who shall, without leave in writing from the persons entitled to grant such leave, take, kill, or destroy any game or fish within the United Kingdom of Great Britain and Ireland, and upon complaint thereof shall be, upon oath of one or more credible witnesses, convicted before any justice, shall for every such offence forfeit the sum of 5*l*."

And the penalty is declared to be recoverable before a single justice of the peace, under the provisions of the 11 & 12 Vict. c. 43; and in default of distress (see "*Conviction*," "*Distress*,") the offender may be imprisoned for any time not exceeding six months.

In such case, one moiety of the penalty is to go to the informer, if he be not a witness, and the other moiety, or (where the offence is proved by the informer), the whole is to be paid to the general agent for the recruiting service in London; and every justice who shall adjudge any such penalty is required, within four days at the farthest, to report the same to the Secretary of State for the War Department. (See "*Military Law*.")

XIII. Of the Recovery and Application of Penalties under the 1 & 2 Will. 4, c. 32. Appeal. Certiorari, &c.

Recovery and
application of
penalties, &c.

We shall proceed to treat of this subject in the following order:—
1. The information.—2. The summons.—3. The hearing of the case, and evidence.—4. The conviction, costs, and application of penalty.—
5. The levying of penalty,—and 6. The appeal, and certiorari.

(1). THE INFORMATION.

(1.) The informa-
tion.

There must be some information in order to convict the defendant. (1 *Saund.* 262, n. 1.) A verbal information will suffice, though it is in general best that it should be in writing. (See "*Conviction*.")

Oath not neces-
sary.

But before any
proceeding had
on the informa-
tion the charge
must be deposed
to on oath by a
witness.

The charge or information need not be on the oath of the informer or prosecutor, but by the 6 & 7 Will. 4, c. 65, s. 9, after reciting 1 & 2 Will. 4, c. 32, s. 41, it is enacted "That where any person shall be charged on the oath of a credible witness with any offence punishable upon summary conviction by virtue of the said last-mentioned act before a justice of the peace, the justice may summon the party charged to appear before himself or any one or two justices of the peace as the case may require, at a time and place to be named in such summons, and if such party shall not appear accordingly, then the justice or justices may proceed in the case in the manner directed by the said act (*post*, p. 785); and that it is expedient to explain and amend the said enactments as hereinafter mentioned;" enacts and declares, "That upon any information made or exhibited before a justice of the peace, of any such offence as aforesaid, it shall not be necessary that the charge contained in such information should be made on the oath of the informer or prosecutor in such case; provided that before any proceeding shall be had or taken upon such information, either for summoning the party accused or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the

oath of some other person or persons being a credible witness or credible witnesses." 13. *Recovery and application of penalties, &c.*

Though the information need not be upon oath, yet it must show upon the face of it that the charge was deposed to on oath by some credible witness, and if not the justices of the peace have no jurisdiction to hear it. (*Reg. v. Scotton*, 13 *L. J. M. C.* 58.)

By the 1 & 2 Will. 4, c. 32, s. 41, "The prosecution for every offence punishable upon summary conviction by virtue of this act shall be commenced within 3 calendar months after the commission of the offence." The information must therefore be laid within that period. (See "*Conviction*." Limitation of prosecution.

The information should state the *day* and *year* on which it is exhibited, as well as the time when the offence was committed; in order that it may appear that the prosecution was commenced within the period limited by the act. But the precise day on which the offence is alleged to have been committed need not be proved as stated; and any variance in this respect will be immaterial, if it appear from the evidence that the prosecution was actually commenced within the given time. (See "*Conviction*." Statement, &c. of time.

The information and conviction must take place in the county, &c., wherein the offence was committed. The place, therefore, wherein such offence took place should be described, in order to show it was within the magistrate's jurisdiction (*R. v. Edwards*, 1 *East*, 278; 14 *East*, 267; *ante*, "*Conviction*"); and also to show to what parish officers the moiety of the penalty is to be given as provided for by the 5 & 6 Will. 4, c. 20, s. 21, *post*, p. 788. (See *Clark v. Taylor*, 3 *Esp.* 218; *R. v. Wyatt*, 2 *Lord Raym.* 1478.) In some places a man may stand in one parish (or county), and shoot into two or three; in such case the place where the offence was committed is where the party stood when he shot, and not where the object was which he shot at. (*R. v. Alsop*, 1 *Show.* 339. See further as to venue in general, *ante*, "*Conviction*," and *post*, "*Indictment*." Proof of place.

(2.) THE SUMMONS, OR WARRANT.

As to the necessity for the defendant's being summoned, and how far a conviction may be justified without it, see in general, *ante*, "*Conviction*." (2.) The summons or warrant.

By the 1 & 2 Will. 4, c. 32, s. 41, "The prosecution for every offence punishable upon summary conviction by virtue of this act shall be commenced within 3 calendar months after the commission of the offence; and that where any person shall be charged on the oath of a credible witness [see now the 6 & 7 Will. 4, c. 65, s. 9, *ante*, p. 784], with any such offence before a justice of the peace, the justice may summon the party charged to appear before himself, or any one or two justices of the peace, as the case may require, at a time and place to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate) the justice or justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be; or the justice before whom the charge shall be made may, if he shall have reason to suspect from information upon oath that the party is likely to abscond, issue such warrant in the first instance, without any previous summons" (*a*). 1 & 2 Will. 4, c. 32 Enforcing appearance.

(a) A general power to summon offenders is given to justices by 11 & 12 Vict. c. 43, s. 1.

13. *Recovery and application of penalties, &c.*

1 & 2 Will. 4, c. 32. Power to summon witnesses.

See further as to the summons and warrant to compel the appearance of the accused, *ante*, "*Conviction*." By sect. 40, a power is given to magistrates to summon witnesses, and a penalty is imposed for disobedience, see *infra*.

(3.) HEARING OF THE CASE AND EVIDENCE, &c.

(3.) Hearing of the case and evidence, &c.

The observations already made, under title "*Conviction*," will here apply.

If the accused party, after being duly summoned, does not appear before the magistrate, by 41 of the 1 & 2 Will. 4, c. 32, it is provided, that upon proof of the due service of the summons, either by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate, the justice or justices may proceed to hear and determine the case in the absence of the party.

Informers not a competent witness.

By the 5 & 6 Will. 4, c. 20, s. 21, one moiety of the penalty is to be paid to the informer, and the other to the overseer or parish officer.

Penalty on witnesses not attending.

By sect. 40, "It shall be lawful for any justice of the peace to issue his summons requiring any person to appear before himself or any one or two justices of the peace, as the case may require, for the purpose of giving evidence touching any offence against this act; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by such summons, and no reasonable excuse for his absence shall be proved before the justice or justices then and there present, or if any person appearing in obedience to such summons shall refuse to be examined on oath touching any such offence by the justice or justices then and there present, every person so offending shall, on conviction thereof before the said justice or justices, or any other justice or justices of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the convicting justice or justices shall seem meet."

The evidence requisite to prove the offence may be collected from the preceding pages.

Evidence. Not necessary to prove a negative.

Sect. 42. It shall not be necessary, in any proceeding against any person under this act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, license, consent, authority, or other matter of exception or defence, shall be bound to prove the same.

Upon what evidence justice ought to convict or not.

The magistrate is put in the place of a jury, and is the sole judge of the weight of the evidence. (*R. v. Davis*, 6 *T. R.* 177; *ante*, title "*Conviction*," *post*, "*Justices*.")

Therefore if there be such evidence before him as would be sufficient to be left to the jury, that is enough, for the superior courts have no authority to enquire further and see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence. But the court will notice the sufficiency of the evidence and set the conviction aside, upon its removal by *certiorari*, if they think the evidence too slight to justify such conviction. (*Rea v. Hale*, *Cowp.* 728; *Ex parte Ransley*, 3 *D. & R.* 572.)

Minute of proceedings.

A magistrate ought to take very correct minutes of what passes upon every conviction before him, and he ought carefully to preserve them for his own protection. (See *Christian's G. L.* 199.)

But it is not imperative on him upon the hearing of a charge, unless it be for a felony or misdemeanor, to take down in writing what is said before him: therefore, it is not necessary on the hearing of a charge of trespass, under sect. 30 of 1 & 2 Will. 4, c. 32, to commit the evidence to writing. (*Robinson v. Vaughton*, 8 *Car. & P.*

252.) If the magistrate in such a case were to take down the evidence in writing, parol evidence of it might still be given. (*Id.*) For the rest of the law relative to the proceedings at the hearing of the case and otherwise before the conviction is drawn up, see *ante*, "Conviction."

13. *Recovery and application of penalties, &c.*

(4.) THE CONVICTION, COSTS, &c.

For the requisites of convictions in general, see "*Conviction.*"

By the 1 & 2 Will. 4, c. 32, s. 39, the justice or justices of the peace (as the case may require) before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up according to the following form of words, or in any other form of words to the same or the like effect; (that is to say,) &c. (*Then follows a form of the conviction, which see post, p. 794.*)

(4.) The conviction, &c.
Form of.

The 5 & 6 Will. 4, c. 20, s. 21 (*post*, p. 788), enacts, that instead of the whole of the penalty going to the overseers, &c., as provided by the 37th sect. of the 1 & 2 Will. 4, c. 32, one-half of it shall go to the informer, and the other to the overseer, &c.; and that the form of the conviction given by the 1 & 2 Will. 4, so far as relates to the distribution of the penalty, shall be altered accordingly, and made conformable to the provisions of the 5 & 6 Will. 4. Since this statute, it is a necessary part of the judgment of the magistrate that he should award and direct that one-half of the penalty be paid to the informer, and the other to the overseers, &c. (*Griffith v. Harries*, 2 M. & W. 335.) Where the conviction directed the whole penalty to be paid "to W. J., one of the overseers of the poor of the parish, &c., to be by him applied according to the directions of the statute in such case made and provided;" it was held bad, and that the justices who signed it were liable to an action for false imprisonment, at the suit of the party convicted and committed to gaol for non-payment of the penalty. (*Id.*)

Also since the 5 & 6 Will. 4, c. 20, s. 21, and 11 & 12 Vict. c. 43, ss. 17 & 32, a conviction is good, which, following the form 1 & 2 Vict. in the latter statute, adjudges the penalty to be paid and applied according to law. (*R. v. Hyde*, 21 L. J. M. C. 94, overruling *Ex parte Hyde*, 14 Jur. 803, although the usual practice is to draw up the conviction adjudging the penalty as provided by the Game Acts.)

As observed by Mr. Deacon in his treatise on the *Game Laws*, p. 105, the form of conviction prescribed by the statute of 1 & 2 Will. 4, should, of course, be followed as nearly as possible; but as the statute provides that the magistrates may draw up the conviction in *any other form of words* to the like effect, the conviction will not be vitiated by unnecessarily stating more than is required. (*R. v. Jefferies*, 4 T. R. 768.) And a conviction under 1 & 2 Will. 4, c. 32, following the form in 11 & 12 Vict. c. 43, sch. I., 2, is good, although by following such form the penalty may not be appropriated in the manner provided by the Game Act. (*Q. v. Hyde*, 7 E. & B. 859 n.) And, indeed, in all cases where the form prescribed by an act of Parliament is not sufficient to ascertain that, which the express provisions of the act require to be ascertained, then it is not proper to adhere literally to the form given by the statute, but to use more precise words for this purpose. (*R. v. Priest*, 6 T. R. 538; *Ex parte Hawkins*, 2 B. & C. 31; and tit. "*Conviction.*")

As to a literal adherence to the form prescribed.

In a conviction for trespassing in pursuit of game under s. 30, it is sufficient to describe the place as certain land situate in the parish of —, in the county aforesaid, without the abutments. (*R. v. Mellor*, 2 Dowl. 173.)

It will be observed that the form of the conviction as given by the 1 & 2 Will. 4, c. 32, s. 39, is the same whether or not the defendant makes default in his appearance.

Where defendant makes default in appearance.

13. *Recovery and application of penalties, &c.*

Stating the evidence.

Application of penalties.

5 & 6 Will. 4, c. 20. One moiety of penalties recovered to be paid to the informer, and the other to the overseer or parish officers.

1 & 2 Will. 4, c. 32. Time for payment of penalties, and scale of imprisonment for non-payment.

Conviction for several penalties.

It will also be observed that the form does not require any statement as to the nature of the evidence adduced on the hearing.

By the 1 & 2 Will. 4, c. 32, s. 37, every penalty and forfeiture for any offence against this act (the application of which has not been already provided for) shall be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate.

But by the 5 & 6 Will. 4, c. 20, s. 21, reciting that by the said last-recited act certain penalties and forfeitures for offences against the said act are directed to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate; and it is expedient to reward the persons who shall prosecute offenders against the said act; it is therefore enacted, "that from and after the passing of this act one moiety of all such penalties and forfeitures as by the last-recited act are directed to be paid and applied as aforesaid shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety thereof only shall go and be paid to such overseer or officer as aforesaid, and be by him applied in the manner by the said last-recited act directed; and the form of conviction set forth in the last-recited act shall, so far as relates to the distribution of the penalty for which judgment shall be given, be made according to the fact and conformably with the direction given by this act as to such distribution." (*Vide ante*, 787.)

The 1 & 2 Will. 4, c. 32, s. 38, enacts that the justice or justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act, together with costs, may adjudge that such person shall pay the same, [see *ante*, p. 787, to whom they must be adjudged to be paid], either immediately or within such period as the said justice or justices shall think fit, and that in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction, (with or without hard labour), as to the justice or justices shall seem meet, for any term not exceeding 2 calendar months (*sic*), where the amount to be paid, exclusive of costs, shall not amount to 5*l.* and for any term not exceeding 3 calendar months in any other case, the imprisonment to cease in each of the cases aforesaid upon payment of the amount and costs.

A defendant may be convicted of several penalties in the same conviction, but then such several penalties must constitute one offence, because 11 & 12 Vict. c. 43, s. 10, which enacts that every information for any offence punishable upon summary conviction shall be for one offence only, and not for 2 or more offences, applies where there is an information for more than one offence. (*R. v. Scott*, 4 B. & S. 368.) But whether the different acts charged constitute more than one offence must in every case depend upon the statute under which the defendant is charged. (*R. v. Swallow*, 8 T. R. 284.) Thus, where the conviction was in the sum of 15*l.* for 3 penalties under the game laws, the defendant being prosecuted for that he, on 3 several days, kept and used traps and engines to kill game; the objection was that he was charged with 3 offences, and the conviction was general, without saying of how many. The words were, "and thereupon he is convicted, and for his several offences aforesaid hath forfeited the sum of 5*l.* for each offence, making together the sum of 15*l.*," &c. &c. Lord Kenyon, C. J., said, "There

is no objection to the conviction on the ground that the defendant has been convicted of several penalties. It is the constant practice in actions on the game laws, and not unfrequent in convictions. Even in indictments for capital offences several offences are sometimes charged, as burglary and stealing in the dwelling-house to the value of 40s. I by no means wish that magistrates, in drawing up convictions, should set all forms at nought; but they ought not to be entangled in greater forms and ceremonies than the superior courts. The word 'convicted' in this case applies to the several offences with which the defendant was charged, and to the evidence given in support of them; and the words following are, 'and for his several offences *aforesaid*,' &c. Taking the whole of the adjudication together, it is evident that the magistrate convicted the defendant in the 3 several offences charged." Conviction affirmed. (And see *R. v. Matthews*, 10 *Mod.* 26; *R. v. Lovet*, 7 *T. R.* 152 (a)).

13. *Recovery and application of penalties, &c.*

We have already considered the amount of the penalty, and how many different penalties the party may subject himself to, *ante*, p. 755. Amount of penalty.

Costs.—When any statute empowers a magistrate to award costs or reasonable charges against an offender, they must be previously settled by him, and the amount specified in the conviction; for an adjudication merely that the defendant shall pay the reasonable charges of recovering the penalty is bad for uncertainty. (*R. v. Symonds*, 1 *East, Rep.* 189; *R. v. Hall*, *Cowp.* 60. See further, *tit. "Costs."*) Costs.

It will be found that the 1 & 2 Will. 4, c. 32, in almost all cases where it imposes a pecuniary penalty on the offender, makes him liable to the costs of the conviction. But it says nothing about costs where the defendant is acquitted. In this case, therefore, they must be regulated by the general provisions of the 11 & 12 Vict. c. 43: which see, *ante*, *tit. "Costs."*

Convictions to be returned to Sessions.—By the 1 & 2 Will. 4, c. 32, s. 43, the justice or justices of the peace before whom any person shall be convicted of any offence punishable upon summary conviction under this act shall transmit every such conviction to the next court of general or quarter sessions of the peace for the county, riding, division, liberty, franchise, city, or town wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court. Convictions to be returned to sessions.

As to this in general, see *tit. "Conviction."*

This is further provided for by 11 & 12 Vict. c. 43, s. 14, which directs the justices to return a record of every conviction to the quarter sessions, but as this section does not fix any time for the convictions to be returned, the words at the next quarter sessions in the 7 & 8 Geo. 4, c. 30, s. 40, were held to be directing and not imperative as to the time. (*Charter v. Græme*, 13 *Q. B.* 216.)

(5.) LEVYING OF PENALTY.

The 1 & 2 Will. 4, c. 32, does not give any power to the magistrates to levy any penalty by distress. But the 38 sect. (*ante*, p. 788) enacts that the justice or justices, by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against the act, together with costs, may adjudge that such person shall pay the same either immediately, or within such period as the said justice or justices shall think fit; and that in default of payment at the time appointed, such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the justice or justices shall seem meet, for any term not exceeding 2 (5.) Levying of penalty. Distress. Commitment.

(a) See *Paley on Convictions*, 4th ed. 218.

13. *Recovery and application of penalties, &c.*

calendar months, (*ante*, p. 788), where the amount to be paid, exclusive of costs, shall not amount to 5*l.*, and for any term not exceeding 3 calendar months in any other case; the imprisonment to cease in each of the cases aforesaid upon payment of the amount of the penalty and costs.

As to the warrant of commitment, see *ante*, tit. "*Commitment in Execution.*"

Commitment not bad for defect in form.

By sect. 45 of the 1 & 2 Will. 4, c. 32, no warrant of commitment shall be held void by reason of any defect therein, provided that it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same. (*Post*, p. 789.)

Payment of penalty after commitment.

By the 11 & 12 Vict. c. 43, which repeals the 5 Geo. 4, c. 18, s. 3, providing for the discharge of an offender upon payment of the penalty together with the costs and charges, it is enacted by s. 31, that if any person committed to prison for non-payment of any penalty, shall desire to pay the same and costs before the expiration of the time of his imprisonment, he may pay the same to the gaoler or keeper of the prison where he is in custody.

(6.) APPEAL AND CERTIORARI.

(6.) Appeal to sessions.

By the 1 & 2 Will. 4, c. 32, s. 44, "any person who shall think himself aggrieved by any summary conviction in pursuance of this act may appeal to the justices at the next general or quarter sessions of the peace to be holden, not less than 12 days after such conviction, for the county, riding, division, liberty, franchise, city, or town wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within 3 days after such conviction, and 7 clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such 3 days enter into a recognizance, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the defender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Notice of.

Recognizance.

Costs.

As to the requisites previous to the appeal as regards notice, recognizance, and appeals in general, see *ante*, tit. "*Appeal.*"

Where a party convicted under the above act appealed, giving notice of several objections on the merits; and by the conviction, when returned to the sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The session quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had the means of knowing how the conviction would be framed; held that, assuming the conviction to be defective in substance, the sessions had no power to quash it on this objection, no notice of it having been given. (*Rex v. Boulbee*, 4 A. & E. 498.)

The court of Queen's Bench has no jurisdiction to direct the court of quarter sessions to rehear an appeal against a conviction under this

act, on the ground of their having rejected evidence which was admissible. (*Ex parte Pratt*, 2 N. & P. 102; *et vide ante*, "*Appeal*.")

Where in an appeal against a conviction, under the 30th sect. of the above act, the sessions would not permit the appellant to show that the place where the trespass was committed did not belong to the respondents, but to the lord of the manor, the court of King's Bench, although the sessions had made a mistake in point of law, refused leave to issue a mandamus to the justices, commanding them to hear the appeal. (*Rex v. The Justices of Berks*, 1 Jur. 380.)

The conviction, if regular on the face of it and unappealed against, is conclusive against the defendant, and precludes him from ever bringing an action for a malicious prosecution of it. (*Mellor v. Baddeley*, 2 C. & M. 675.)

Sect. 45. No summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his Majesty's superior courts of record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same. (See *Rex v. Boulton*, 4 A. & E. 498; *ante*, tit. "*Conviction*.")

A conviction under the 30th section (*ante*, p. 773) is still irremovable under this 45th section, notwithstanding the 5 & 6 Will. 4, c. 20, s. 21, *ante*, p. 788. (*R. v. Hester*, 4 Dowl. 589.)

As to removing a conviction, notwithstanding such an enactment; and as to the writ of *certiorari* in general, see tit. "*Certiorari*."

15. Offence of night poaching and going armed, &c.

1 & 2 Will. 4, c. 32.

No *certiorari*.
Defects in form, &c.

XIV. Protection of Persons acting in Execution of 1 & 2 Will. 4, c. 32. Limitation of Actions. Tender of Amends.

Sect. 47, for the protection of persons acting in the execution of this act, enacts that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within 6 calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; [see 5 & 6 Vict. c. 97, s. 4; *post*, "*Justices*"]; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought (*b*), or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant.

Venue, &c. in proceedings against persons acting under act (*a*).

Notice of action.

General issue.

Tender of amends.

XV. Offence of Night Poaching and going Armed, &c., against 9 Geo. 4, c. 69.

The provisions of this act will be considered as regards—
First, its general clauses affecting all its provisions.

Division of subject.

(*a*) As to enactments of this description in general, see *post*, tits. "*Justices*" and "*Constables*."

(*b*) Magistrates may now, by 11 &

12 Vict. c. 44, s. 11, give evidence of a tender of amends under the general issue,

15. *Offence of night poaching and going armed, &c.*

Secondly, the offences punishable thereunder by summary conviction and the apprehension of offenders; and,
 Lastly, the offences punishable thereunder by indictment.
 As to the offence of destroying hares and rabbits in warrens in the night, see *post*, p. 801.

(1.) GENERAL CLAUSES OF 9 GEO. 4, c. 69.

What shall be deemed night.

12. For the purposes of this act the night shall be considered, and is hereby declared to commence at the expiration of the *first hour after sunset*, and to conclude at the beginning of the *last hour before sunrise*.

What shall be deemed game.

13. For the purposes of this act the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards" (a).

Limitation of proceedings.

As to the limitation of proceedings, see sect. 4, *post*, p. 794.

(2.) OFFENCES PUNISHABLE UNDER 9 GEO. 4, c. 69, BY SUMMARY CONVICTION AND APPREHENSION OF OFFENDERS.

9 Geo. 4, c. 69.
 Punishment for taking game at night (b).

The 9 Geo. 4, c. 69, "*An act for the more effectual prevention of persons going armed by night for the destruction of game*," enacts, if any person shall by night (c) unlawfully take or destroy any game (d), or rabbits in any lands, whether open or inclosed (e), or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game (d), such offender shall, upon conviction thereof before 2 justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding 3 calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in 10*l.* and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of 6 calendar months, unless such sureties are sooner found; and in case such person shall so offend a *second time*, and shall be thereof convicted before 2 justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding 6 calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in 20*l.* and 2 sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of 2 years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a *third time*, he shall be guilty of a *misdemeanor*, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for 7 years, or to be imprisoned and kept to hard labour (f) in the common gaol or house of correction for any term not exceeding 2 years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

First offence.

Second offence.

Third offence.

Scotland.

(a) See the 1 & 2 Will. 4, c. 32, s. 2, *ante*, p. 742, as to what shall be deemed game within that act.

(b) See the observations on this section, *post*, p. 797.

(c) What is night, see sect. 12, *supra*.

(d) What is game, see sect. 13,

ante, p. 266.

(e) The 7 & 8 Vict. c. 29, *post*, p. 793, extends this section, and also sect. 9, to persons found destroying game or rabbits on public roads, &c.

(f) So by 3 Geo. 4, c. 114, he may be sent to hard labour.

Under this section the entry must be for taking or destroying game in the lands entered, therefore a conviction which set forth that C. did by night enter certain inclosed lands with a net for the purpose of taking game, to wit, partridges and pheasants, was held bad for not stating the intent to be to take game there. (*Fletcher v. Culthorp*, 6 Q. B. 880. And in *Harris v. Hoskins*, 34 L. J. M. C. 145, the court held it to be no offence within this section where a person was found with a net for the purpose of taking game upon land which had a hedge on each side of it, and a metalled road running through it.)

By the 7 & 8 Vict. c. 29, after reciting the above section, it is enacted that all the pains, punishments, and forfeitures imposed by the said act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorised by the said act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this act into execution as if the same had been herein specially set forth.

Sect. 2. Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant (a), to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace (b); and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for 7 years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding 2 years (c); and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

Sect. 3. Where any person shall be charged on the oath of a credible witness, or in Scotland on the application of the procurator fiscal of court, before any justice of the peace, with any offence punishable upon summary conviction by virtue of this act, the justice may issue his warrant for apprehending such person, and bringing him before 2 justices of the peace, to be dealt with according to law.

15. *Offence of night poaching and going armed, &c.*

9 Geo. 4, c. 69.

7 & 8 Vict. c. 29

9 Geo. 4, c. 69.
Apprehension of offenders (a).

Assaulting game-keepers.

Warrant for apprehension of offenders.

(a) See *post*, p. 796.

(b) See the observations on this section, *post*, p. 795.

(c) A party thus offending may be

also indicted under the 24 & 25 Vict. c. 100, s. 38, for committing an assault with intent to resist or prevent his lawful apprehension.

15. *Offence of night poaching and going armed, &c.*

Limitation of prosecution.

Sect. 4. The prosecution for every offence punishable upon summary conviction by virtue of this act shall be commenced within 6 calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction by virtue of this act, shall be commenced within 12 calendar months after the commission of such offence.

By 11 & 12 Vict. c. 43, s. 11, 6 months is the time limited for laying any information or making any complaint where no other time is specially provided for in the act constituting the offence. In game cases the issuing of the warrant has been considered to be the commencement of proceedings, and the indictment their termination. *Per Erle, C. J.*, in *Reg. v. Smith*, 31 L. J. M. C. 105. In *Reg. v. Wallace*, 1 East, P. C. 186, and *Reg. v. Brooks*, 1 Den. C. C. 217, the proceedings before justices were held to be the commencement of the prosecution; (see also *R. v. Hull*, 2 F. & F. 16; and *R. v. Killminster*, 7 C. & P. 228.)

Form of conviction.

Sect. 5. The justices of the peace before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect as the case may require; (that is to say),

"Be it remembered, that on the day of , in the year of our Lord , at in the county of [or, riding, division, liberty, city, &c. as the case may be], A. O. is convicted before us [naming the justices], two of his Majesty's justices of the peace for the said county, [or, riding, &c.], for that he the said A. O. did [specify the offence, and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction]; and we the said justices adjudge the said A. O. for his said first offence to be imprisoned in the , and there kept to hard labour for the period of , and at the expiration of such period to find sureties by recognizance [or bond of caution in Scotland], himself in the sum of 10l. and two sureties in the sum of 5l. each, or one surety in the sum of 10l., conditioned that he the said A. O. shall not so offend again for the space of one year next following; and we further adjudge the said A. O., in case he shall not find such sureties as aforesaid, to be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties shall be sooner found. Given under our hands the day and year first above mentioned."

Appeal, &c. (a).

Sect. 6. Any person who shall think himself aggrieved by any such summary conviction may appeal to the next court of general or quarter sessions, which shall be holden not less than 12 days after the day of such conviction, for the county, riding, or division wherein the cause of complaint shall have arisen: Provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within 3 days after such conviction, and 7 clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such 3 days enter into a recognizance, or bond of caution in Scotland, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and upon such notice being given, and such recognizance or bond being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge

Notice of recognizance.

(a) See fully as to appeals in general, *ante*, tit. "*Appeal*."

the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded; and shall, if necessary, issue process for enforcing such judgment.

Sect. 7. No such conviction or adjudication made on appeal therefrom shall be quashed for want of form (b) or be removed by *certiorari* or otherwise into any of his Majesty's superior courts of record, or in Scotland by advocacy or suspension, into any superior court; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Sect. 8. On every conviction under this act for a first or second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a *second* or *third* offence; and the clerk of the peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party (b).

With respect to who has authority to apprehend an offender under the 2nd section of the above act, it has been held that a person who is employed by a lord of a manor as a watcher of his game preserves is a person having authority to apprehend night poachers, and that he need not have any written authority from the lord of a manor to enable him to do so. (*Rex v. Price*, 7 C. & P. 178; and see *Rex v. Ball*, 1 R. & M. 165.) So in *R. v. Fielding*, 2 C. & K. 621, it was held that a watcher employed by the head keeper had sufficient authority to apprehend a poacher where the keeper had never had any direct communication with the then owners of the land, but had been paid by them, as he had been by his former master the late owner of the property. See *ante*, p. 778, 25 & 26 Vict. c. 114, as to the powers of apprehension in highways, &c. conferred by that act. The servant of a party who has only permission from the owner of a wood to sport there has no authority to apprehend a poacher there. (See *Rex v. Addis*, 6 C. & P. 388; and *R. v. Price*, 15 J. P. 149.)

Unless the offender be found upon the land, he cannot be apprehended. (*Reg. v. Curnock*, 9 C. & P. 730; *vide ante*, p. 793.) In *R. v. Mendham*, 2 C. & K. 633, *Wightman, J.*, held that gamekeepers are not justified in attempting to apprehend poachers upon a highway. But since the 14 & 15 Vict. c. 19, s. 11, it would seem that any person could apprehend another committing for the third time any of the offences provided for by s. 1 of the same act, because it thus becomes an indictable misdemeanor, and is punishable by imprisonment or penal servitude.

The word "found" in the 57 Geo. 3, was held to mean "having been seen or discovered." (See *Att.-Gen. v. Delano*, 1 Price, 383.) The words of that statute were, "enter into or be found in any forest," &c., and therefore, where the defendant was not found in the close, but was seen in an adjoining close, and, shortly before he was seen, shots were heard in the close, and the jury found that he had been firing in the close, it being reserved for the judges, whether it was necessary to prove that the defendant was seen in the close, where the indictment stated him to have been found; they held, that, as the jury were satisfied that the defendant had been in the close armed, it was sufficient. (*Rex v. Worker*, R & M. 165.)

15. *Offence of night poaching and going armed, &c.*

Costs.

No *certiorari*, &c. (a).

Convictions to be returned to sessions registered, and may be given in evidence.

Who has authority to apprehend.

Who may be apprehended.

(a) As to *certiorari* in general, see tit. "*Certiorari*."

(b) As to enactments of this nature, see *ante*, tit. "*Conviction*."

15. *Offence of night poaching and going armed, &c.*

In what way.

Resistance by poachers when arrest lawful.

Resistance when arrest unlawful.

Although s. 2 is confined to offences in s. 1, still an offender under s. 9 may be apprehended; for though a greater punishment is inflicted where several are out armed together, it is still an offence within s. 1. (*Rex v. Ball, Moody, C. C. 330.*)

A gamekeeper, or other person lawfully authorised, may apprehend a poacher without giving notice of his purpose or calling upon the poacher to surrender; (*Rex v. Payne, Moody, C. C. 378; Rex v. Taylor, 7 C. & P. 266;*) and without announcing in what capacity he apprehends him. (*Rex v. Whithorne, 3 C. & P. 394; Rex v. Taylor, 7 C. & P. 266; Rex v. Davis, 7 C. & P. 785.*)

If a gamekeeper, or other person, attempting lawfully to apprehend a poacher be met with violence, and in self-defence strike the poacher, and then is killed by the poacher, it will be murder. (*R. v. James Ball, Moody, C. C. 333.*)

So in *Rex v. Price, (7 C. & P. 178,)* it was held, that if a person be found night poaching on the manor of A. by one of his watchers and be pursued off the manor, and then on to it again, and there snaps his gun at the watcher, he was guilty of a capital offence under the stat. 9 Geo. 4, c. 31, ss. 11 & 12, now repealed.

And so if gamekeepers attempt to apprehend persons armed with offensive weapons, who are poaching in the night, and one of the gamekeepers be shot by one of the poachers, this will be murder in all, unless it be shown that either of the poachers separated himself from the rest, so as to show that he did not join in the act. (*Rex v. Edmeads, 3 C. & P. 390; Rex v. White, R. & R. 99.*)

And where gamekeepers had seized two persons who were poaching in the night, and they having surrendered called to a third, who came up, and he killed one of the gamekeepers; it was held to be murder in all, though the two struck no blow. (*Rex v. Whithorne, 3 C. & P. 394.*)

But where the servant of A., who had only permission from the owner of a wood to sport there, was killed there by a poacher whom the servant was endeavouring to apprehend, it was held manslaughter only. (*Rex v. Addis, 6 C. & P. 388.*)

And where a party not authorised to arrest poachers on the lands of B. pursued a night poacher on such lands, with intent to take him, it was held that this was such an attempt at an illegal arrest, that, if the poacher had shot the servant with the gun he had in his hand, and killed him, it would have been manslaughter only. (*Rex v. Davis, 7 C. & P. 785.—Parke, B.*)

But it has been held, that the interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. (*Rex v. Warner, Moody, C. C. 380.*)

The servant of the owner of a wood attempted to apprehend a poacher whom he found there on the morning of the 17th of December, and the poacher shot at him; held, that this was not a capital offence within the stat. 9 Geo. 4, c. 31, ss. 11 & 12, now repealed, as there was no proof that the poacher was in pursuit of game an hour before sunrise. (*Rex v. Tomlinson, 7 C. & P. 183.*)

A. was night poaching in a wood belonging to B., and B. came up to A. and presented a pistol at him, saying, "Damn you, surrender;" A. said, "Now don't you," and raised an air-gun and discharged it, and wounded B. *Semble*, that if B. had died it would not have been a case of murder. (*Reg. v. Jones, 9 C. & P. 258.*) See *ante*, p. 778, for the 25 & 26 Vict. c. 114, an act for the prevention of poaching.

(3.) OFFENCES UNDER 9 GEO. 4, C. 69, PUNISHABLE BY INDICTMENT.

By the 9 Geo. 4, c. 69, s. 9, if any persons, to the number of 3 or more together, shall by night (a) unlawfully enter or be in any land, whether open or inclosed (b), for the purpose of taking or destroying game (c) or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding 14 years, nor less than 7 years, or to be imprisoned and kept to hard labour for any term not exceeding 3 years; and in Scotland any person so offending shall be liable to be punished in like manner (d).

We have already seen (*ante*, p. 792), that a third offence of night poaching, by unarmed persons, is by s. 1 of this act made a transportable misdemeanor.

15. *Offence of night poaching and going armed, &c.*

Persons to the number of three going out armed.

Punishment.

Third offence.

What an offence within the Act.—The 9th section creates two distinct offences:—1st, the *entering* in night on land to the number of three, some one of them being armed; and, 2nd, the *being* in the night on land to the number of three, some one of them being armed. (*R. v. Kendrick*, 7 C. & P. 184; but this is not free from doubt.)

What an offence within the act.

It has been ruled, that, if persons standing in a road hang nets on the twigs of a hedge within a close, it is an entry into such close within the enactment. (*Athead's case*, 2 *Lewin*, 191; *Russell on Crimes*, 478, 3rd ed.)

It is not essential to prove upon an indictment under this 9th section that all the persons charged should actually enter the enclosed places. If they are all associated together for the common purpose of taking game contrary to the statute, it is sufficient if some enter whilst others are near enough to aid and assist (*R. v. Whittaker*, 17 L. J. M. C. 127); and in *R. v. Uezzel*, 20 L. J. M. C. 192, Lord Campbell said the words of the statute are in any land open or inclosed, and it is unnecessary to name a particular close in the indictment. If the men are there together, forming a party for the purpose of taking game in any part of the land, though the land comprises whiteacre, blackacre, and greenacre, and other fields, and though one of the men be in one and one in another, they commit an offence against the statute. See also *R. v. Lockett*, 7 C. & P. 301.

But if three persons go out together night poaching, one being armed, and two of them stand in a road, and set nets in the hedge of a field of M. A., and send their dog into the field to drive hares into the net, and after this the third leaves them in the road, and goes to poach by himself in another field of M. A., this has been held not to support an indictment for night poaching on land of M. A.; for the sending in of a dog is not an entering of land within the enactment; and the entering of the second field was not a joint act of the three. (*Reg. v. Nickless*, 8 *Cur. & P.* 757.)

It is not necessary that the defendants should be actually seen in the close laid in the indictment; it is sufficient if there be evidence to satisfy the jury upon this point. (*R. v. Capewell*, 5 C. & P. 549.)

Evidence of.

If the indictment state that the defendants entered into a certain close with intent then and there to kill game, it must be proved that they had the intent to kill game in the particular close named. (*R. v.*

(a) What is night, see sect. 12, *ante*, p. 792.

(b) See *ante*, p. 793 n.

(c) What is game, see sect. 13,

ante, p. 792.

(d) 20 & 21 Vict. c. 302, abolishes transportation, and substitutes the punishment of penal servitude.

15. *Offence of night poaching and going armed, &c.*

Intent to take game.

Some of the defendants must be armed.

Capewell, 5 C. & P. 549; *R. v. Gainer*, 7 C. & P. 231; and see *R. v. Barham*, R. & M. C. C. 151, decided under the repealed statute.) But it may be doubtful whether this is the case, if the words "and there" are not in the indictment. (*Id.*; and see *R. v. Davis*, 8 C. & P. 759.)

To constitute an offence within the act, the defendants, or some of the party must be armed with a gun or other offensive weapon.

A constructive arming is not sufficient. (*Reg. v. Davis*, 8 C. & P. 759.)

If several persons are out with intent to kill game, and only one of them is armed, the rest who are unarmed are, it seems, liable to be convicted under the above enactment. In *R. v. Smith*, (*Russ. & Ry. C. C. R.* 368,) they were held liable under such circumstances to be convicted on the repealed act, 57 Geo. 3.

If several went into a close in the night, to kill game, and one had arms, *without the knowledge of the others*, the others who were unarmed were not liable to be convicted under the repealed act of 57 Geo. 3; *R. v. Southern*, *Russ. & Ry. C. C. R.* 444; but it seems they would be under the present act.

It is not necessary that the defendants should be actually seen armed in the close laid in the indictment; it is sufficient if there is evidence to satisfy the jury of this fact. (*R. v. Nash*, R. & R. C. C. 386; *R. v. Worker*, R. & M. 165.)

What are offensive weapons.

Large stones are offensive weapons, within the meaning of the act, if they are of a description capable of inflicting serious injury if used offensively, and were brought and used by the defendant for that purpose. (*Rex v. Grice*, 7 Car. & P. 803.) But a stick or bludgeon is not an offensive weapon, unless the defendant intended to use it as such. (*R. v. Palmer*, 1 M. & Rob. 70.) Therefore the mere use of a small stick, as a weapon, by a poacher, in a sudden affray with gamekeepers, is not enough to prove such stick an offensive weapon. The jury must be convinced that the party took it with him for the purpose of offence. (*Rex v. Fry*, 2 M. & Rob. 42.)

The indictment.

Description of close.

The Indictment.—The offence is of a local nature, and the indictment must, it seems, describe the close by name or occupation, or abutments. (See *R. v. Ridley*, R. & R. C. C. 515.) Where the land was described in one count as a "certain close," in another as "certain inclosed ground," but there was nothing in the indictment to show what particular close or what particular inclosed ground was meant, it not being described by name, ownership, occupation, or abutments: the prisoner being convicted, five of the judges held the description of the place insufficient, because the offence was substantially a local offence, and the prisoner was entitled to know to what specific place the evidence was to be directed; three of the judges thought differently. The judgment was arrested. (*Id.*; *et vide R. v. Mellor*, 2 Dowl. 173.) "A certain cover in the parish of A." is too general a description. (*R. v. Crick*, 5 C. & P. 508; but see now *R. v. Uezzel*, 20 L. J. M. C. 192, *ante*, p. 797.)

It is not necessary to state whether the land was inclosed or not. (*Rex v. Andrews*, 2 M. & Rob. 37.)

In one case it was ruled, that if one of a party of poachers be found on the land specified, the rest co-operating in the pursuit in adjoining land, all may be alleged to be found on the land specified. (*Rex v. Andrews*, *supra*; *R. v. Uezzel*, 20 L. J. M. C. 192.)

The indictment must show that the entry and the being on the land was by night. Therefore where an indictment alleged that A. B. C. D., &c., on &c., at &c., to the number of three and more together, did, by night unlawfully enter divers closes, and inclosed lands there situate, and being, in the occupation of E. F., and were then and there in the said closes and inclosed lands armed with guns, for the purpose of destroying game; it was held, that it did not contain a sufficient aver-

Must state an entry, &c. by night.

ment that the defendants were by night in the closes armed for the purpose of destroying game. And the judgment given for the crown, at the Chester great sessions, was reversed. (*Davies v. The King*, 10 B. & C. 89.) *Et per Lord Tenterden*, C. J.—“Assuming the indictment to be sufficient in that respect, it still appears to us that the judgment must be reversed. The phrase used is, that the defendants ‘did by night unlawfully enter divers closes, and were there and then in the said closes,’ &c., not that they ‘by night did unlawfully enter, and,’ &c. If the words ‘by night’ had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but not that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct the indictment is bad, and the judgment must be reversed.”

15. *Offence of night poaching and going armed, &c.*

The indictment, it seems, need not contain any specific allegation that the defendants entered the close between the expiration of the first hour after sunset and the beginning of the last hour before sunrise. (*Riley's case*, 1 Lewin, 149; *Pearson's Case*, *Id.* 154.)

In the indictment it is advisable to insert a distinct averment that the defendants were armed when they entered and were in the land, in addition to the usual allegation, “being then and there by night as aforesaid armed.” (*Rex v. Wilkes*, 7 C. & P. 811, *per Parke*, B.; and see *R. v. Kendrick*, 7 C. & P. 184; and see *Davies v. The King*, *supra*.)

That defendants were armed.

Where an indictment for night poaching charged that A. and B., together with another person, entered certain land, “the said A. and B. then and there being armed,” it was held that it was not supported by proof that the third person was armed, and that A. and B. were not so. (*Reg. v. Davis*, 8 C. & P. 759; and see *R. v. Smith*, *R. & R. C. C.* 368.)

A count for night poaching under sect. 9, may be joined with a count on sect. 2, for assaulting a gamekeeper, and with counts for assaulting a gamekeeper in the execution of his duty, as also with a count for a common assault. (*R. v. Finacane*, 5 C. & P. 551.)

Joinder of counts, &c.

Where there was one indictment for shooting at a gamekeeper with intent to murder him, and another indictment for night poaching, both founded on the same transaction, it was held, that the prosecutor was not bound to elect which he would proceed upon, as the offences were quite distinct, and one of them could not possibly merge in the other. (*R. v. Handley*, 5 C. & P. 565.)

The confirmation of an accomplice should be as to some circumstance affecting the party accused, as by showing the party and accomplice together under such circumstances as were not likely to have occurred, unless there was concert between them. (*R. v. Farlar*, 8 C. & P. 106.) In a case of night poaching, the only confirmation was, that, on the evening of the offence, the accomplice and the prisoner were seen drinking together at a public-house, commonly frequented by the prisoner, and that they both left the house together, when it was shut up for the night. This was considered no sufficient confirmation; and *semble*, also, that the accomplice having been summarily convicted of poaching, under sect. 1 of the stat. 9 Geo. 4, c. 69, did not at all dispense with his being confirmed on the trial of another person, under sect. 9 of the act. (*Id.*)

Evidence confirmative of accomplice.

16. *Stealing, &c. of deer—Assaulting keepers.*

& 25 Vict. c. 96.
Stealing, &c. deer in unclosed parts of forests, &c.

Summary conviction and penalty.

Second offence.

Felony.

XVI. Stealing, &c. of Deer, Destroying Park Palings, &c. Assaulting Keepers, &c.

Deer Stealing in Unclosed parts of Forests.—By stat. 24 & 25 Vict. c. 96, s. 12, whoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the *unclosed* part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding 50*l.*, as to the justice shall seem meet; and whosoever having been previously convicted of any offence relating to deer, for which a *pecuniary penalty* shall have been imposed by this or any other act, shall afterwards commit any of the offences *hereinbefore enumerated*, whether such second offence be of the same description as the first offence or not, shall be guilty of *felony*, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement; and if a male under the age of 16 years of age, with or without whipping.

Stealing Deer.—24 & 25 Vict. c. 96, s. 13, enacts that whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement; and if a male under the age of 16 years, with or without whipping.

Where a summary conviction for an offence under the repealed act 7 & 8 Geo. 4, c. 29, s. 26, which was in the same terms as the present section, did not state substantively where the place was situate where the offence was committed, but in awarding the distribution of the penalty gave it to the overseers of D. in the said county "where the said offence was committed," it was holden good. (*R. v. Weale*, 5 C. & P. 135.)

A party indicted for a second offence under the latter part of the above section may take exception to the validity of the previous conviction, and if it be bad, he cannot be convicted. (*R. v. Allen*, R. & R. C. C. 513.)

Penalty on suspected persons having venison, or engines for destroying deer, and not accounting for it.

How justices proceed if they cannot convict.

Persons suspected of having Venison in their Possession.—By stat. 24 & 25 Vict. c. 96, s. 14, if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person being carried before a justice of the peace shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding 20*l.*; and if any such person shall not under the provisions aforesaid be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of

money as is hereinbefore last mentioned. See the general clauses of this act, *post*, "*Larceny*."

Setting Engines and destroying Park Paling, &c.]—By 24 & 25 Vict. c. 96, s. 15, whoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money not exceeding 20*l.*, as to the justice shall seem meet. See the general clauses of this act, *post*, "*Larceny*."

17. *Killing, &c. of hares and conies in warrens, &c.*

24 & 25 Vict. c. 96. Setting engines and destroying park paling, &c.

Seizing Dogs, Guns, &c. Assaulting Keepers.]—By 24 & 25 Vict. c. 96, s. 16, if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding 2 years with or without hard labour, and with or without solitary confinement; and if a male under the age of 16 years, with or without whipping.

Seizing of dogs, guns, &c.

Assaulting keepers, &c.

By 24 & 25 Vict. c. 96, s. 104, any constable or peace officer may take into custody without warrant any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he may suspect with good cause of having committed or being about to commit any felony against this act.

In *R. v. Hull*, 2 C. & K. 326, it was decided that pulling a deer-keeper to the ground, and holding him there whilst another escaped, was not a beating within the 7 & 8 Geo. 4, c. 29, s. 29; it must be a beating in the popular sense of the word.

The act done by the deer keeper upon which the battery ensued must be in the due exercise of the powers given him by the act.

The repealed statute of 16 Geo. 3 did not extend, it seems, to assistant keepers, and no previous demand was necessary before the seizure of guns, &c. (*R. v. Amery, Russ. & Ry. C. C.* 500.)

As to seizing offenders, &c., in night poaching, see *ante*, p. 795.

Destroying Covert.]—As to this offence, see 7 & 8 Geo. 4, c. 30, s. 17, *ante*, "*Burning*."

Destroying covert.

XVII. Killing, &c., of Hares and Conies in Warrens, &c.

By 24 & 25 Vict. c. 96, s. 17, whosoever shall unlawfully and wilfully between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, take or kill any hare or

Offence of killing hares or conies in warrens, &c. in night time.

17. *Killing, &c. of hares and conies in warrens, &c.*

24 & 25 Vict. c. 96.

In day-time.

Proviso as to sea and river banks.

What an offence within act.

Abettors punishable on summary conviction.

A person in act of committing offence may be apprehended without a warrant.

A justice on suspicion proved on oath, may grant a search-warrant, as for stolen goods.

coney in any warren or ground lawfully used for the *breeding or keeping* of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly; and whosoever shall unlawfully and wilfully between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the justice shall seem meet: provided always, that nothing in this section contained shall affect any person taking or killing in the day-time any conies on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank (a).

As to the punishment, &c., for unlawfully taking or destroying rabbits in any lands, whether open or inclosed, in the night-time, see *ante*, p. 792.

The act applies to places commonly called rabbit warrens, and not to places where a few rabbits may be kept. (*R. v. Garrett*, 6 *Car. & P.* 369.) Therefore, a rick-yard in which rabbits were kept was held not within the act. (*Id.*)

The term "taking," in this enactment, means "catching," and not taking away. Where a defendant who set several wires in a warren, in one of which a coney was caught, was seized just as he was laying hold of the wire to take the coney, which was then alive; the judges held this to be a taking within the meaning of the repealed act, 5 *Geo. 3*, c. 14, s. 6. (*R. v. Glover*, *R. & R. C. C.* 269.)

By 24 & 25 Vict. c. 96, s. 99, whosoever shall aid, abet (b), counsel, or procure (b), the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only; shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling or procuring (b), to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence, as a principal offender, is by this act made liable.

By 24 & 25 Vict. c. 96, s. 103, any person found committing (c) any offence punishable either by indictment or upon summary conviction by virtue of this act, except only the offence of angling in the day-time, may be immediately apprehended, without a warrant, by any person, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever on or with respect to which any offence punishable either upon indictment or upon summary conviction by virtue of this act shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised, and (if in his power) is required, to apprehend

(a) The reason of this proviso is to prevent the destruction of the Lincolnshire banks by the increase of conies.

(b) As to accessories in general,

see *ante*, tit. "Accessory."

(c) See as to the meaning of these terms, *ante*, p. 795, and tit. "Malicious Injuries to Property."

and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

Sect. 105. Where any person shall be charged, on the oath of a credible witness, before any justice of the peace with any offence punishable on summary conviction under this act, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant, and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

Sect. 106. Every sum of money which shall be forfeited on any summary conviction for the value of any property stolen or taken, or for the amount of any injury done (such value or amount to be assessed in each case by the convicting justice), shall be paid to the party aggrieved, except where he is unknown; and in that case, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such value or amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid or applied in cases where the statute imposing the same contains no direction for the payment thereof to any persons (a). Provided that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property, or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than such value or amount, and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

Sect. 107. In every case of a summary conviction under this act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol, or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding 2 months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed 5*l.*; and for any term not exceeding 4 months, where the amount with costs shall not exceed 10*l.*; and for any term not exceeding 6 calendar months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

Sect. 108. Where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction upon his making such satisfaction to the

17. *Killing, &c. of hares and conies in warrens, &c.*

24 & 25 Vict. c. 96.

Compelling appearance of persons punishable on conviction.

Application of forfeitures and penalties.

Proviso.

If a person summarily convicted shall not pay, &c. the justice may commit him.

Scale of imprisonment.

Justice may discharge offender in certain cases.

(a) See the 11 & 12 Vict. c. 43, s. 31, as to the application of penalties, *tit.* "Penalties" and "Conviction."

17. *Killing, &c. of hares and conies in warrens, &c.* party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

24 & 25 Vict. c. 96.
A conviction a bar
to other proceed-
ings for same
cause.

Sect. 109. In case any person convicted of any offence punishable upon summary conviction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or from the lord lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

Appeal (a).

Sect. 110. In all cases where the sum adjudged to be paid on any summary conviction shall exceed 5*l.*, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions, which shall be holden not less than 12 days after the day of such conviction for the county or place wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within 3 days after such conviction, and 7 clear days at the least before such sessions; and shall also either remain in custody until the sessions, or enter into a recognizance with 2 sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded, or if such appeal shall be against any conviction, whereby only a penalty or other sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal, and upon such notice being given, and such recognizance being entered into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and in any case where, after any such deposit shall have been made as aforesaid, the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted; and in any case where after any such deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid, the clerk of the peace, or other proper officer, shall forthwith endorse on the conviction a memorandum that the same has been so quashed; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

(a) As to appeals in general, see tit. "*Appeal*."

Sect. 111. No such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari*, into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

18. *Laws as to Swans.*

24 & 25 Vict. c. 96.

No *certiorari*, &c. (a).

Sect. 112. Every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shown.

Conviction to be returned to sessions (b).

How far evidence in future cases.

Sect. 120. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the 11 & 12 Vict. c. 43, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the 14 & 15 Vict. c. 93, or in such other manner as may be directed by any act that may be passed for like purposes; and all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this act: Provided, that nothing in this act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the city of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

Summary proceedings in England under 11 & 12 Vict. c. 43; in Ireland under 14 & 15 Vict. c. 93.

As to the rights of warren, &c., see *ante*, p. 746.

Rights of warren, &c.

As to the certificate to kill conies, &c., see *ante*, p. 763.

XVIII. Laws as to Swans.

A swan is a royal fowl; and all those the property whereof is not known do belong to the Queen by her prerogative. (*Case of the Swans*, 7 Rep. 16.)

A swan a royal fowl.

It is felony to take any swans that be lawfully marked, though they be at large. (*Dalt.* c. 156.)

Stealing swans marked.

As to swans unmarked, if they be domesticated or tame, that is, kept in a moat or in a pond near to a dwelling house, to steal such is also felony. (*Id.*) So it seemeth of swans unmarked, so long as they keep within a man's manor, or within his private rivers; or if they happen to escape from thence, and be pursued and taken, and brought in again (*Id.*); but if swans that are unmarked shall be abroad, and shall attain to their natural liberty, then the property of them is lost; and so long felony cannot be committed by taking them. (*Id.*) And yet such unmarked and wild swans the Queen's officers may seize (being abroad) for the Queen's use by her prerogative. Also the Queen may grant them, and by consequence another may prescribe to have them, within a certain precinct or

Swans unmarked.

(a) See tits. "*Certiorari*" and "*Commitment*."

(b) See tit. "*Conviction*."

21. *Laws as to noxious birds or animals.* place. (*Id.*; *Reg. v. Lady Young*, 7 *Rep.* 18. And see *post*, tit. "Larceny.")

Swans' eggs.

By the 1 & 2 Will. 4, c. 32, s. 24 (*ante*, p. 769), if any person not having the right of killing game upon any land, nor having permission from the person having such right, shall wilfully take out of the nest or destroy in the nest upon such land the eggs of swans, or have eggs so taken in his possession, such person shall forfeit a penalty not exceeding 5s. for every egg, &c.

XIX. Laws as to Pigeons.

Who may erect a dove-cote.

A lord of a manor may build a dove-cote upon his land, parcel of his manor; but a tenant of the manor cannot do it without licence. (3 *Salk.* 248.) But any freeholder may build a dove-cote on his own ground. (*Cro. Jac.* 382, 490.)

Dove-cote not a nuisance.

And it hath been adjudged that erecting a dove-house is not a common nuisance, nor presentable in the leet. (*Cro. Jac.* 490, 491.)

Killing, &c., house pigeons.

By 24 & 25 Vict. c. 96, s. 23, "whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall on conviction before a justice of the peace, forfeit and pay over and above the value of the bird, any sum not exceeding 2*l.*" (See *Rex v. Brooke*, 4 *Car. & P.* 131.) See the general clauses affecting all the provisions of this act, *post*, "Larceny."

Pigeons trespassing.

If the pigeons come upon my land, and I kill them, the owner hath no remedy against me; though I may be liable to the statutes which make it penal to destroy them. (*Cro. Jac.* 492.)

Pigeons to go to the heir.

Doves in a dove-house, young and old, shall go to the heir, and not the executor. (1 *Inst.* 8.)

Pigeons which, though they have free access to the open air, are tame and reclaimed, and return to their house or box, are the subjects of larceny. (*Reg. v. Howell*, 2 *Den. C. C.* 362, n.)

XX. Laws as to Wild Ducks, Teal, or Widgeon, and other Birds.

Decoys.

As to decoys, &c. see *ante*, p. 570.

Destroying nests, &c.

By the 1 & 2 Will. 4, c. 32, s. 24, any person not having the right of killing game upon any land, nor having permission from the person having such right, wilfully taking out of the nest or destroying in the nest upon such land the eggs of *wild ducks, teal, or widgeons*, is subjected to a penalty not exceeding 5s. for every egg, &c.

Grouse.

Grouse are not birds of warren. (*Duke of Devonshire v. Lodge*, 7 *B. & C.* 36.)

Rookeries.

As to rookeries see *ante*, pp. 750, 772.

XXI. Laws as to Noxious Birds or Animals.

Noxious birds, and animals, &c.

With regard to fowl not used to be eaten, together with certain other noxious animals, there were provisions made by an ancient statute, viz., 8 Eliz. c. 15, intituled "An Act for the Preservation of Graine," which it were to be wished might be revived with a proper consideration of the difference of the value of money betwixt that time and the present; by which it was required that the churchwardens should levy by an assessment, and pay for the heads of every three old crows, choughes, or rookes, 1*d.*; of sixe young crows, choughes, or rookes, 1*d.*; and for every sixe egges of any of them, 1*d.*; for every twelve stares' heads, 1*d.*; for every heade of merten, hawkes, fursekytte, mouldkytte, busarde, chagge, carmeraunt, or ryngtale, 2*d.*; and for

two egges of them, 1*d.* ; for every iron or ospray's heade, 4*d.* ; for the heade of every wood wall, pye, jay, raven, kyte, or king's fisher, 1*d.* ; bulfyne, or other bird that devoureth the blowth of fruit, 1*d.* ; for the heade of every fox or graye, 12*d.* ; and for the heade of every fytchewe, polcate, wesel, stote, fayre, bade, or wilde cat, 1*d.* ; for the heade of every otter or hedgehogge, 2*d.* ; for the heades of three rattes or twelve mise, 1*d.* ; for the heade of every want or molewarp, one halfpenny.

And by another ancient statute, 24 Hen. 8, c. 10, every town-ship was required to keep a crow net, to destroy crows, rookes, and choughs.

There is some shadow of these regulations still remaining in some parishes, where they give a reward for destroying several of the above said noxious fowl and vermin. These statutes were suffered to expire, probably because in a short time there would be no need of their continuance ; but it might be convenient, nevertheless, to revive the like provisions from time to time ; and amongst the rest of the ravenous tribe to set a price now at length upon the head of that distinguished fowl, for the sake of which most of the ancient laws concerning the winged game were enacted, and which it was felony to destroy. But now the current hath received a contrary direction ; and the hawk himself destroys more game than gunpowder and hailshot, which hath usurped his empire.

As to entering on land to destroy foxes, see *ante*, p. 772.

As to keeping of ferocious dogs, see "*Dogs* ;" and as to nuisances in ferocious dogs, general, see *post*, "*Nuisance*."

XXII. *Forms, List of.*

Forms as to Gamekeepers :

APPOINTMENT of a gamekeeper under the 1 & 2 Will. 4, c. 32, s. 13 (No. 1).

The like of a gamekeeper in Wales, by a person entitled to the game, on lands of the value of 500*l.* per annum, under s. 15 (No. 2).

DEPUTATION of a person as gamekeeper, with authority to kill game for his own use, under s. 14 (No. 3).

Forms as to Killing, &c. Game, without having a power to do so, under 1 & 2 Will. 4, c. 32 :

GENERAL form of information for an offence, under the 1 & 2 Will. 4, c. 32 (No. 1).

GENERAL form of summons, or of a warrant of apprehension, or of summons to a witness (No. 2).

GENERAL form of conviction under the act (No. 3).

CONVICTION on s. 23, for killing game without a certificate (No. 4).

The like for using a dog, &c. for killing game without a certificate (No. 5).

The like, on s. 12, for killing, &c. or permitting another to kill, &c. game, where the right is given by statute exclusively to lessor or landlord (No. 6).

The like, for killing, or permitting another to kill, game, when reserved to landlord by the lease (No. 7).

The like, for the like offence, where the game belonged to a person by virtue of a free warren (No. 8).

DISTRESS warrant (No. 9).

NOTICE of appeal against conviction (No. 10).

RECOGNIZANCE to hear and try appeal (No. 11).

22. Forms.*Forms relative to Sporting without a Game Certificate :*

- INFORMATION before two commissioners or one magistrate on 52 Geo. 3, c. 93, for not producing a certificate on demand (No. 12).
 INFORMATION on same act for sporting without a certificate (No. 13).
 GENERAL FORM of summons (No. 14).
 CONVICTION for killing game without a certificate (No. 15).
 DISTRESS warrant thereon (No. 16).
 INDORSEMENT of costs on warrant of distress (No. 17).
 COMMITMENT for want of distress (No. 18).
 RECOGNIZANCE on appeal against conviction (No. 19).

Forms relative to Buying and Selling of Game :

- LICENCE to sell game (No. 20).
 CERTIFICATE to be issued by clerks of commissioners of assessed taxes to every person licensed to deal in game (No. 21).
 CONVICTION on the 1 & 2 Will. 4, c. 32, s. 19, against a licensed person for dealing in game without having taken out the 2*l.* certificate (No. 22).
 The like on s. 25, against an uncertificated person for selling or offering to sell game without a licence (No. 23).
 CONVICTION on same section against certificated person, for offering to sell game to one unlicensed to deal in it (No. 24).
 The like, under s. 27, against unlicensed person for buying game of unlicensed dealer (No. 25).
 The like, on s. 28, for buying, &c. game from uncertificated or unlicensed person (No. 26).
 The like, against licensed dealer for selling, &c. game without a board affixed to his shop, &c. (No. 27).
 CONVICTION against licensed dealer for affixing a board denoting his licence to more houses than one (No. 28).
 The like against licensed person for selling game elsewhere than at his house, &c. (No. 29).
 The like against unlicensed person for pretending to be licensed, &c. (No. 30).
 APPEAL, &c. (No. 31).

Forms relative to Trespasses :

- NOTICE not to trespass (No. 32).
 CONVICTION under the 1 & 2 Will. 4, c. 32, s. 39, for trespassing on land in pursuit of game (No. 33).
 CONVICTION for a like offence, where the trespass was committed by five persons or more (No. 35).
 CONVICTION on s. 31, against trespasser for refusing to tell his name on being required by person entitled to game (No. 36).
 The like for continuing on the land after being required to quit it by person authorised by party entitled to game (No. 37).
 The like for giving an illusory description of place of abode to the occupier of the land (No. 38).
 CONVICTION under s. 2, against two persons for going out with three others, to number of five together, and deterring a gamekeeper from approaching them to order them off land (No. 39).
 CONVICTION of a trespasser in the Queen's park or forest under s. 33 (No. 40).

Forms relative to the Killing, &c. of Game, &c. at improper Times or in an improper Manner : 22. Forms.

INFORMATION (No. 41).

SUMMONS (No. 42).

CONVICTION on 1 & 2 Will. 4, c. 32, s. 3, for killing game on a Sunday or Christmas-day (No. 43).

The like for killing two partridges between 1st Feb. and 1st Sept. (No. 44).

The like for killing *pheasants* between 1st Feb. and 1st Oct. (No. 45).

The like for killing black game between 10th Dec. and 20th Aug., not being in Somerset or Devon or in New Forest (No. 46).

The like for killing grouse between 10th Dec. and 12th Aug. (No. 47).

CONVICTION on s. 24, for destroying eggs of game, &c. (No. 48).

The like for having in possession eggs of game, &c. (No. 49).

The like for laying poison to kill game, &c. (No. 50).

Forms relative to Buying and Selling of Game, &c. :

INFORMATION (No. 51).

SUMMONS (No. 52).

CONVICTION on 1 & 2 Will. 4, c. 32, s. 4, of licensed dealer for selling or having game in possession ten days beyond the season (No. 53).

The like of person not licensed to deal in game for selling game ten days beyond the season (No. 54).

The like of person not licensed to deal in game for having game in his possession forty days beyond the season (No. 55).

Forms relative to the Offence of going Armed at Night to Kill Game, &c. :

CONVICTION on 9 Geo. 4, c. 69, s. 1, for a first offence, in destroying game in night (No. 56).

The like for entering land by night armed for taking game (No. 57).

The like, for a second offence, in either of the two last cases (No. 58).

INDICTMENT on s. 1, for a third offence of night poaching after two convictions (No. 59).

INDICTMENT on s. 2, for assaulting gamekeeper in endeavouring to apprehend offender detected in night poaching (No. 60).

The like, for assaulting a person assisting a gamekeeper where immediate pursuit was made after offender (No. 61).

INDICTMENT on s. 9, against three or more, for entering land in night for taking game (No. 62).

Forms relative to Deer, Deer Stealing, Assaulting Keepers, &c. :

COMMITMENT on 7 & 8 Geo. 4, c. 29, s. 26, for stealing &c., deer in *inclosed* ground (No. 63).

INDICTMENT for the like offence (No. 64).

CONVICTION for killing, &c., deer in *uninclosed* ground (No. 65).

COMMITMENT for a second offence, in stealing deer, &c., in *uninclosed* ground (No. 66).

INDICTMENT for a second offence (No. 67).

SEARCH-WARRANT on s. 27, to find venison, snares, &c. (No. 68).

CONVICTION for not accounting for possession of venison, &c. (No. 69).

SUMMONS against persons through whose hands such venison may have passed (No. 70).

CONVICTION against such persons (No. 71).

22. *Forms.*

CONVICTION on s. 28, for setting snares to take deer (No. 72).
 CONVICTION for pulling down park fences, &c. (No. 73).
 COMMITMENT on s. 29, for assaulting, &c. a gamekeeper (No. 74).
 INDICTMENT for the like offence (No. 75).

Forms relative to Hares, Conies, Hare Stealing, &c. :

COMMITMENT on 7 & 8 Geo. 4, c. 29, s. 30, for killing, &c. hares or conies in the night (No. 76).
 INDICTMENT for like offence (No. 77).
 CONVICTION for taking hares or conies in breeding grounds, in the day-time (No. 81).
 CONVICTION for setting snares to take hares or conies in warrens, &c. (No 82).

Forms relative to Pigeons :

CONVICTION on 7 & 8 Geo. 4, c. 29, s. 33, for killing a pigeon (No. 83).

FORMS AS TO GAMEKEEPERS.

(1). Appointment of gamekeeper under 1 & 2 Will. 4, c. 32, s. 13 (*ante*, p. 757).

Know all men by these presents, that I, A. B., of _____, in the county of _____, esquire, lord of the manor of _____, in the said county, have (by virtue of the statute in such case made and provided) nominated, authorised, and appointed, and by these presents do nominate, authorise, and appoint C. D. of _____, in the county of _____, yeoman, to be my lawful gamekeeper, to preserve and kill [if the appointment is only to preserve the game, the words "and kill" should be omitted] the game within the said manor for my sole use and immediate benefit, with full power and authority, according to the directions of the said statute, to seize and take for my use within the limits of the said manor all such dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used within the said limits by any person not authorised to kill game for want of a game certificate. And further, to do, execute, and perform all and every act and acts, thing and things, within the limits of the said manor, which, by virtue of the statute in such case made and provided, or of any laws of this realm, belong and appertain to the office of a gamekeeper, during my will and pleasure, and for which this shall be his sufficient warrant. [If the appointment is only to preserve the game, then, instead of the above, add this conclusion: "And further, to do, execute, and perform, all and every act and acts, thing and things, which are requisite and necessary for the preservation of the game within the same manor, and the limits thereof, and for the discovery of offenders therein according to the directions of the statute in such case made and provided"]. In witness whereof, I, the said A. B., have hereunto set my hand and seal, the _____ day of _____, in the year of our Lord _____.
"Signed, sealed, and delivered,
in the presence of _____ }

(2). Appointment of gamekeeper in Wales, by person entitled to game on lands of value of 500l. per annum, under 1 & 2 Will. 4, c. 32, s. 15 (*ante*, p. 758).

*Know all men by these presents, that I, A. B., of _____, in the county of _____, in the principality of Wales, esquire, being entitled to kill the game upon certain lands called _____, situate in the parish of _____, in the county aforesaid, of the clear annual value of five hundred pounds, of which said rents I the said A. B. am seized of an estate in fee simple, (*ante*, p. 758), and which said lands are not within the bounds of any manor, lordship, or royalty, have nominated, authorised, and appointed, and by these presents do nominate, authorise, and appoint, C. D. of _____, in the county of _____, yeoman, to be my lawful gamekeeper, to preserve and kill [or, if the appointment is only to preserve the game, omit the words, "and kill"] the game over and upon the said lands [if the appointment is meant to extend to other lands, then add, "And also over and upon certain other lands called _____, situate in the parish of _____, in the county aforesaid, and now in the occupation of G. W., which said last-mentioned lands are not within the bounds of any manor, lordship or royalty, and he the said G. W. being*

entitled to kill the game upon the lands, and having also by licence in writing duly authorised me to appoint a gamekeeper to preserve and kill the game thereon, pursuant to the directions of the statute in such case made and provided," (see ante, p. 758),] for my sole use and immediate benefit; with full power and authority to seize and take for my use upon the said lands all such dogs, nets, and other engines and instruments whatsoever for the killing or taking of game, as shall be used upon the said lands by any person not authorised to kill game for want of a game certificate. And further, to do, execute, and perform all and every act and acts, thing and things, in, over, and upon the said lands, which by virtue of the statute in such case made and provided, or by any laws of this realm, belong to the office of a gamekeeper, during my will and pleasure, and for which this shall be his sufficient warrant. In witness, &c. [Conclude as in preceding form].

Know all men by these presents, that I, A. B., of &c. lord of the manor of _____, in the county of _____, have by virtue of the statute in such case made and provided, nominated, appointed, and deputed, and by these presents do nominate, appoint, and depute C. D. of _____, in the county of _____, esquire, to be my lawful gamekeeper of and within my said manor of _____, with full power, licence, and authority, as such gamekeeper, to kill game within the same manor for his own use, or for the use of any other person or persons whomsoever; and also to seize and take for his own use within the limits of the said manor all such dogs, nets, and other engines and instruments for the killing or taking of game, as shall be used upon the said lands by any person not authorised to kill game for want of a game certificate. And further to do, execute, and perform all and every act and acts, thing and things, in and upon the said lands, which in any way belong or appertain to the office of a gamekeeper, by virtue of the statute in such case made and provided, or by virtue of any laws of this realm, during my will and pleasure; and for doing which this shall be his sufficient warrant. In witness, &c. [Conclude as in form, ante, p. 810, No. 1.]

(3). Deputation of person as gamekeeper, with authority to kill game for his own use, under 1 & 2 Will. 4, c. 32, s. 14 (ante, p. 758).

FORMS AS TO KILLING, &c. GAME, WITHOUT HAVING A POWER TO DO SO, UNDER 1 & 2 WILL. 4, c. 32.

Be it remembered, that on the _____ day of _____, in the year of our Lord, _____, at _____, in the said county of _____, A. I. of _____, in the said county of _____, labourer, personally came before me, J. P., esquire, one of her Majesty's justices of the peace for the said county [or, "riding," "division," "franchise," "liberty," "city," &c. as the case may be], and now informs me upon his oath duly administered to him in that behalf, that A. O., of _____, in the said county, labourer, within three calendar months now last past, that is to say, on the _____ day of _____, A. D. _____, at the parish of _____ (b), in the said county of _____, did unlawfully kill [or, "take"] game [or, "did use a dog, &c. for the purpose of killing game"], the said A. O. not being then and there authorised so to do for want of a game certificate, contrary to the statute in such case made and provided [or, "did," here specify any other offence, and the time and place when and where the same was committed, as the case may be; and if the information be for two or more distinct offences, proceed by stating them thus: "And the said A. I. further informeth me the said justice, that &c." [stating the subject matter of the complaint]*, contrary to the form of the statute in that case made and provided]; whereby he hath forfeited the sum of [5l.]; and which said charge contained in such information is now deposed to before me on the oath of W. W. and E. W., being credible witnesses in this behalf; such oath being now duly administered to the said W. W. and E. W., in this behalf; and thereupon the said A. I. prayeth the judgment of me the said justice in the premises, and that the said A. O. may be summoned to answer and make defence to the premises aforesaid.

(1). General form of information for an offence under 1 & 2 Will. 4, c. 32 (a).

A. I.

Taken and sworn before me the day } J. P.
and year first above mentioned.

(a) Vide ante, p. 787; and the words used in the form of the conviction prescribed by the act, post,

p. 812, No. 3.

(b) State the parish accurately.

22. Forms.

(2). Summons, &c. of party accused.

Warrant of apprehension.

Summons of a witness.

(3). General form of conviction as prescribed by 1 & 2 Will. 4, c. 32 (a).

See the form of summons when directed to the party himself, *ante*, "*Conviction*," and the form when directed to a constable. *Id.*

See the form of warrant of apprehension after a previous summons, *post*, "*Warrant*." See also the form of warrant where the party charged is likely to abscond. *Id.*

See form of summons of a witness, title, "*Conviction*."

Be it remembered, that on the _____ *day of* _____ *, in the year of our*
to wit, } Lord _____ *, at* _____ *, in the county of* _____ *[or, "riding," "division,"*
"franchise," "liberty," "city," &c. as the case may be], A. O. is convicted
before me J. P., one [or, "us J. P. and J. J. P. two," as the case may require]
of her Majesty's justices of the peace in and for the said county [or, "riding,
&c.,"], for that he the said A. O. within the space of three calendar months now*
last past to wit on (b) _____, at (c) _____, did unlawfully kill [or "take"] game
[or, "did use a dog, &c. for the purpose of killing game"], he the said A. O.
not being authorised so to do for want of a game certificate, contrary to the statute
in such case made and provided [or, "did," here specify any other offence, and
the time and place when and where the same was committed, as the case may
be]; and I [or, "we"] do adjudge that the said A. O. shall for the said offence
forfeit the sum of _____ *[or, "we do adjudge that the said A. O. shall for the*
said offence forfeit the sum of _____ *, being after the rate of* _____ *for every head*
of game so, &c. or for every egg so &c.,"] and shall forthwith pay the said sum,
together with the sum of (d) _____ for costs; and that, in default of immediate
payment of the said sums, he the said A. O. shall be imprisoned (e) [or, "im-
prisoned and kept to hard labour"] in the _____ *of* _____ *for the space of* _____
, unless the said sums shall be sooner paid [or, "and I" or, "we"] order that
the said sums shall be paid by the said A. O. on or before the _____ *day of* _____
and in default of payment on or before that day I [or, "we"] adjudge the said
A. O. to be imprisoned [or, "imprisoned and kept to hard labour"] in the
of _____ *, for the space of* _____ *, unless the said sums shall be sooner paid"]; and I [or, "we"] direct that one moiety of the said sum of* _____ *[i. e. the penalty]*
shall be paid to A. J., the person who hath informed and prosecuted for the
same (f), and the other moiety thereof to _____ *, being one of the overseers of the*
poor of the said parish [or, "township," or, "place;" the parish, township, or
place in which the offence was committed](g), to be by him applied according to
the directions of the statute in such case made and provided; and I [or, "we"]
order that the said sum of _____ *for costs shall be paid to the said A. J. [the*
complainant]. Given under my hand [or, "our hands"] (h) the day and year
first above mentioned.

*J. P. [or J. P.
and J. J. P.]*

(4). Conviction on 1 & 2 Will. 4, c. 32, s. 23, for killing game without a certificate (i).

[Commence as in the preceding form, to the asterisk]—*for that the said A. O., on the* _____ *day of* _____ *, in the year of our Lord* _____ *, at the parish afore-*
said, in the county aforesaid, did kill [or, "take"] certain game, to wit, two
partridges, the said A. O. not being then and there authorised so to do for want
of a game certificate; contrary to the statute in such case made and provided.

(a) This form is prescribed by the act.

(b) A variance in the day stated from the proof will not be material.

(c) The place should be stated accurately, and be alleged to be in the county.

(d) This sum must be ascertained and fixed in the conviction. (See *R. v. Hall*, 1 Cowp. 60; *R. v. Symonds*, 1 East Rep. 89.)

(e) As to commitments in execution in general, see tit. "*Commitment in Execution*."

(f) Vide *ante*, p. 788.

(g) The 1 & 2 Will. 4, c. 32, s. 37, and the 5 & 6 Will. 4, c. 20, s. 21, allow the magistrate to direct the payment to be made to any other officer of the parish, &c. where the offence was committed, for the general county rate.

(h) A conviction should in general be under the hand and seal of the convicting magistrate; but this form, which is prescribed by the act, renders the sealing unnecessary.

(i) See *ante*, p. 754.

And we do adjudge that the said A. O. shall for the said offence forfeit the sum of 5*l.* (a), and shall forthwith pay the said sum, together with the sum of (ante, p. 812. n. (d)) for costs; and that in default, &c. [Conclude as in the form preceding.]

22. Forms.

[Commence as in the form, ante, p. 812, No. 3, to the asterisk]—for that the said A. O., on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid, did use a dog [or, “gun,” “net,” or, “an engine, to wit, an engine called ,” or, “an instrument, to wit, an instrument called ”] for the purpose of searching for [“killing,” or, “taking”] game, to wit, [partridges], the said A. O. not being then and there authorised so to do for want of a game certificate, contrary to the statute in such case made and provided, and we do adjudge that the said A. O. shall for the said offence forfeit the sum of 5*l.* (a), and shall forthwith pay the said sum, together with the sum of (ante, p. 812, n. (d)) for costs; and that in default, &c. [Conclude as in the form, ante, p. 812, No. 3.]

(5). The like on same section for using a dog, &c. for killing game without a certificate (b).

[Commence as in the form, ante, , No. 3, to the asterisk]—for that the said A. O., on the day of , in the year aforesaid, at the parish aforesaid, in the county aforesaid, was the occupier of certain land, that is to say of a certain close called (d) , situate in the parish aforesaid and county aforesaid, under a certain lease theretofore granted to the said A. O. by E. F. [or, “(under a certain agreement made between the said C. D. and E. F.)”] before the passing of the statute passed in the second year of the reign of his late Majesty King William the Fourth, intituled “An act to amend the laws in England relative to game,” to wit, on the first day of January, in the year of our Lord 1829, the right of killing the game upon such land not being expressly granted or allowed to the said A. O. by such lease [or, “agreement”], and no fine or fines having been taken upon the original granting or renewal of such lease [or, “agreement”], and such lease [or, “agreement”] not having been made for any term of years exceeding twenty-one years; but being for a term less than twenty-one years, that is to say, for a term of [seven] years not yet elapsed (e). And the said A. O., so then and there being such occupier of such land as aforesaid, on the said day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid, did unlawfully and wilfully pursue [or, “kill,” or, “take”] (f) [or, “did unlawfully and wilfully give permission to one G. G. to pursue [or, “kill,” or, “take,”] and the said G. G. did then and there unlawfully and wilfully pursue [or, “kill,” or, “take”]], upon the said land, certain game, to wit, two partridges and two hares, without the authority of the said E. E. or any other person having the right of killing the game upon the said land so to do, contrary to the statute in that case made and provided; and we do adjudge that the said A. O. shall for such offence forfeit the sum of 4*l.* (g), being after the rate of 1*l.* for every head of game so killed [or, “taken”] as aforesaid (h), and shall forthwith pay the said sum of 4*l.*, together with the sum of 1*l.* (see ante, p. 812, n. (d)) for costs, &c. [Proceed as in the form, ante, p. 812, No. 3, to the end.]

(6). Conviction on 1 & 2 Will. 4, c. 32, s. 12, for killing, &c. or permitting another to kill, &c. game, where right to it is given by the statute exclusively to lessor or landlord (c).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O., on the day of , in the year aforesaid, at the parish aforesaid, in the county aforesaid, was the occupier of certain land, that is to say, of

(7). The like for killing, &c. or permitting another to kill, &c. the game

(a) The penalty is 5*l.* or less. But it is cumulative, see ante, p. 763.

(b) See ante, p. 754.

(c) See ante, p. 754.

(d) If there be no name, or you cannot ascertain it, then set out the abutments or else the occupation. See ante, p. 798.

(e) Let this correspond with the fact.

(f) See ante, p. 755.

(g) If the party be guilty only of pursuing the game, then the penalty is 2*l.* only; but the penalty is 1*l.* for every head of game killed or taken, or less. (See ante, p. 756.)

(h) If the defendant be only convicted of pursuing game, these words, “being after the rate of 1*l.* for every head of game so killed as aforesaid,” must be omitted. See ante, p. 756.

22. *Forms.* a certain close called (b), situate in the parish aforesaid and county aforesaid, under and by virtue of a certain lease thereof theretofore made to him from E. F. [or, "under and by virtue of a certain agreement theretofore made between him and E. F."], by which said lease [or, "agreement"] the right of killing the game upon such land then was and is specially reserved by [or, "granted to"] (see ante, p. 754), the said E. F. in exclusion of the right of the said A. O. of killing the game upon such land; and that the said A. O., so being such occupier as aforesaid, on &c. [Proceed as in the preceding form, No. 6, from the asterisk to the end.]

- (8). The like for the like offence, where the game belonged to a person by virtue of a free warren (a). [Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O., on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid, was the occupier of certain land then and there called (b), situate in the parish aforesaid and county aforesaid, the right of killing the game upon such land then and there exclusively belonging to E. F., that is to say, by virtue of his franchise of free warren in and over the said land; and that the said A. O., so being such occupier as aforesaid, on &c. [Proceed as in the form, ante, p. 813, No. 6, from the asterisk to the end.]

- (9). Distress. It will be observed that the act of 1 & 2 Will. 4, c. 32, gives no powers of distress, but only a power to imprison the offender if he makes default in payment of the penalty (ante, p. 788). As to the distress for penalties for sporting without a certificate, see post, p. 817.

- (10). Notice of appeal against conviction (c). To , of , in the county of . I hereby give you notice that I, A. O., of , do intend at the next quarter sessions of the peace to be holden in and for the county of , at , in the said county, to appeal against a certain conviction of me the said A. O. by J. P., esq., and K. B., esq., two of her Majesty's justices of the peace for the said county, for my having as thereby alleged, on &c., at &c. [here state the substance of the offence or offences as stated in the conviction]; and that the causes and grounds for such my appeal are, that I was not and am not guilty of the said offence [or, "offences, or either of them"], and that the said conviction is illegal, and that &c. [here state other causes of appeal as specifically as you can]. Dated this day of , A.D. C. D.

- (11). Recognizance to hear and try appeal. This form of recognizance may be readily framed from that, post, p. 817.

FORMS RELATIVE TO GAME CERTIFICATE UNDER 52 GEO. 3, c. 93, SCHEDULE L.

[See forms of game certificates, tit. "Taxes."]

- (12). Information on 52 Geo. 3, c. 93, Sch. L. Rule 11, for not producing a certificate on demand (d). } Be it remembered that on &c., at &c., A. I., of &c., in his proper person, cometh before me, J. P., one of her Majesty's justices of the peace in and for the county of , and also being a commissioner acting in the execution of the statutes relating to excise duties for the district of [or, "cometh before us and , being commissioners acting in the execution of the acts relating to the excise for the district of "], and now here before me [or, "us"], maketh information and complaint that* A. O., of the parish of , in the county of , within three calendar months last past, to wit, on the day of , at the parish of , in the said county, and within

(a) See ante, p. 754.

(b) See ante, p. 813, n. (d).

(c) As to appeal, see ante, p. 790, and

see as to appeals in general, ante, title, "Appeal."

(d) See ante, p. 766.

the district aforesaid (a), was discovered by one J. J. using (b) a dog ["gun," "net," or, "a certain engine, to wit, an engine called a"] (c) for the purpose of taking [or, "killing"] game ["woodcocks," "snipes," "quails," "landrails," or "conies" (c)] there, he, the said J. J., being then and there, and at the time the said A. O. was so discovered as aforesaid, an assessor [or, "collector"] (d) of the said parish of , (ante, p. 788), in the county aforesaid, and within the district aforesaid; and thereupon the said J. J. (he the said J. J. then and there being such assessor (e) [or, "collector"] of the said parish of , as aforesaid) did then and there demand and require from the said A. O., then and there so acting as aforesaid, the production of a certificate issued to him for that purpose, as is directed by the statute in that case made and provided, and that no such certificate was then and there produced to the said J. J., and that thereupon the said J. J. having made such demand as aforesaid, and no such certificate being produced to him, the said J. J. as aforesaid then and there required the said A. O. forthwith to declare to him the said J. J. the Christian name and surname and place of residence of him the said A. O., and also the parish or place (if any) in which he the said A. O. had been assessed to the duties by an act of Parliament made and passed in the 23rd and 24th years of the reign of her Majesty, intituled [here set out title of act], granted or consolidated therewith; and that the said A. O. then and there, after such demand made, wilfully refused to produce and show any such certificate as aforesaid, or in default thereof as aforesaid to give unto the said J. J. the Christian name and surname and place of residence of him the said A. O., and the parish or place (if any) in which he had been assessed to the said duties [or, "then and there

(a) In some cases some further description of the place upon which the gun, &c. was used must be given, in order to show that the person demanding the certificate was authorised so to do. (See ante, p. 766.) As, for instance, if the party was discovered using the gun, &c., by the lord of the manor in which he was when he used the gun, it should be stated, that the party used the gun within the manor.

(b) If the offence be for refusing to produce a certificate, &c., where the party is assisting an uncertificated person, &c., then say, "assisting [one E. F.] in the taking [or, "killing"] of game ["woodcocks," "snipes," or, "conies, &c.,"], by means of a gun ["dog," "net," or other means, naming them], there,* the said act of assisting as aforesaid not being then and there done in the company or presence and for the use of any person who had then duly obtained in his own right such certificate for killing [or, "taking"] game, [or, &c. (see supra)], as is directed by the statute in that case made and provided, nor being then and there done in the company or presence and for the use of any person who by virtue of such a certificate, then obtained in his own right, then and there used his own dog ["gun," "net," or other engine] for the taking [or, "killing"] of such game ["woodcock," "snipe," "quail," "landrail," or, "coney,"], (ante, p. 764), and who did not then and there

act therein by virtue of any deputation or appointment." [The part from the asterisk, it would seem, might be omitted. Concluding as above].

(c) It will be seen, ante, p. 764, that a party may use nets or springs for taking woodcocks or snipes without a certificate; and see ante, p. 764, when conies may be killed without a certificate, and p. 761, when hares.

(d) Or according to the fact, "a commissioner for the execution of the acts relating to assessed taxes, acting for the said county" ["riding," "division," or, "place"].

Or, "a lord [or, "lady," or, "gamekeeper"] of the said manor" [or, "royalty" or "lands"]. (See n. (a), supra).

Or, "inspector [or, "surveyor"] of taxes, acting in the execution of the acts for assessed taxes for the district aforesaid."

Or, "a person duly assessed to the duties granted by an act of Parliament made and passed in the 23rd and 24th years of the reign of her Majesty Queen Victoria, intituled, 'An act to repeal the duties on game certificates, and certificates to deal in game, and to impose in lieu thereof duties on excise licenses and certificates for the like purposes.'"

Or, "the owner [or, "landlord," or, "lessee," or, "occupier"] of the land hereinafter mentioned, called , [as the case may be].

(e) Or according to the fact. (See supra).

22. Forms. *produced to the said J. J. a false certificate," or, "a fictitious certificate:" or "then and there gave to the said J. J. a false name, that is to say, the name of " or "a false place of residence, that is to say, the place of " or, "a false place of assessment, that is to say, &c." or, "a fictitious place of assessment, that is to say, &c.," as the case is], contrary to the form of the statute in that case made and provided; and by means of the premises, and by force of the statute in that case made and provided, the said A. O. hath forfeited for his said offence the sum of 20l. [may be mitigated to 10l.]: whereupon the said A. I. prays the judgment of me the said justice and commissioner [or, "us the said commissioners"] in the premises, and that the said A. O. may be summoned to answer the premises before me the said justice and commissioner [or, "us the said commissioners"]. Exhibited before me [or, "us"], this day of _____, in the year of our Lord _____ A. I.*

(13). Information on 52 Geo. 3, c. 93, Sch. L. Rule 12, for using a dog, &c. without a certificate (a). [Proceed as in the above information (No. 12), to the *, and then thus:—*A. O., of the parish of _____, in the county of _____, [labourer], within three calendar months now last past, to wit, on the _____ day of _____, at the parish of _____, in the county of _____, and within the district aforesaid, did use a dog ["gun," "net," or, "a certain engine, to wit, an engine called a (b), for the purpose of taking [or, "killing"] game ["woodcocks," "snipes," "guails," "landrails," or "conies" (b)], to wit, [partridges], [according to the fact], there, without having obtained such certificate as is directed by the statute in that case made and provided, contrary to the form of the statute in that case made and provided; whereby, and by force of the statute in that case made and provided, the said A. O. hath forfeited for his said offence the sum of 20l. [may be mitigated to 10l.] Whereupon the said A. I. prayeth the judgment of us the said commissioners [or, "me the said justice and commissioner"] in the premises, and that the said A. O. may be summoned to answer the premises before us the commissioners aforesaid [or, "me the said justice and commissioner"]].*

Exhibited before me _____ [or, "us"], the _____ day of, &c. _____ A. I.

(14). Summons thereon. } *To _____, of the parish of _____, in the county of _____. Whereas information and complaint have been made before me one, &c. [or, "us two," &c.] [describe the justice or commissioner, as in the information], at _____, that you, on the _____ day of _____, at the parish of _____, in the county of _____, and within the district of _____, did [here state the offence as in the information].*

These are to require you the said A. O. to appear before me [or "us"] (ante, p. 785), at _____, in the said county of _____, on the _____ day of _____, at the hour of _____, in the _____ noon of the same day [to answer to the said information and complaint, and to be further dealt with according to law]; [if the summons be to a witness omit the words in brackets, and say, "to give evidence touching the matters contained in the said information, on the part of the said A. I." [or, "of the said A. O."]] Given under my [or, "our"] hands and seals, this _____ day of _____, &c.

(15). Conviction for killing game without a certificate. The stat. 52 Geo. 3, c. 93, Sch. L. Rule XV. prescribes the form, which see, ante, _____.

(16). Warrant of distress thereon. } *To the constable of _____, in the county of _____, and others whom this may concern.*

Whereas A. O., of _____, in the said county [labourer], is this day, at &c., convicted before me J. P., esquire, one of her Majesty's justices of the peace in and for the said county, and one of the commissioners, &c. [as in the conviction], upon the oath of A. B., a credible witness, for that he the said A. O., on &c. [describe the offence as in the conviction], and adjudged by me to pay the sum of [20l.] for his said offence; these are therefore, in

her said Majesty's name, to command you to levy the said sum by distress of the goods of the said A. O.; and if, within the space of four days next after such distress by you taken, the said sum shall not be paid, that then you do sell the said goods so by you distrained, and out of the money arising by such sale you do pay the sum of _____ to J. J. of _____, in the said county, one of the collectors of the assessed taxes for the parish of _____ aforesaid, for the use of her Majesty, returning the overplus (if any) on demand unto the said A. O.: and if sufficient distress cannot be found of the goods of the said A. O. whereon to levy the said sum of [20l.], that then you certify the same to me, together with the return of this precept. Given under my hand and seal, the _____ day of _____, &c.

22. Forms.

I, the within-named justice of the peace and commissioner [or, "we," &c., (17). Indorsement as in the warrant], do hereby indorse and declare the sum of _____ to be the reasonable costs attending the information, conviction, and warrant of distress (as on the other side hereof expressed), settled by me to be levied by the said constable of _____, and paid to the said informer (ante, 788). Given under my hand the day and year last within written. J. P.

{ To the constable of _____, in the county of _____, and to the keeper of the house of correction at _____, in the said county, and others whom this may concern. (18). Commitment thereon for want of distress.

Whereas A. O., of, &c. [labourer], was at, &c., on, &c., convicted before me, one, &c. [as in the warrant of distress], upon the oath of A. B., a credible witness, for that he the said A. O., on, &c. [here state the offence as in the conviction], and adjudged by me to pay the sum of [20l.] for his said offence; and whereas on the said _____ day of _____, in the year aforesaid, I did issue my warrant to the constable of _____ to levy the said sum of [20l.] by distress and sale of the goods of the said A. O., and to apply the same according to law; and whereas it duly appears to me, as well on the oath of the said constable as otherwise, that he the said constable hath used his best endeavours to levy the said sum of [20l.] on the goods of the said A. O. as aforesaid, but that no sufficient distress can be had whereon to levy the same: these are therefore to command you, the said constable of _____ aforesaid, to apprehend the body of the said A. O., and him safely to convey to the house of correction at _____, in the said county, and there deliver him to the said keeper thereof, together with this precept. And I do hereby command you the said keeper of the said house of correction to receive into your custody in the said house of correction the said A. O., and him there safely keep for the space of six calendar months, unless such penalty shall be sooner paid; and for so doing this shall be your sufficient warrant. Given under my hand and seal, the _____ day of _____, &c.

{ Be it remembered, that on the _____ day of _____, in the _____ year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, A. O., of _____ in the said county [labourer], [if with sureties, say, "A. S. of _____, [farmer], and C. S. of _____, [tailor]," came before me one of her Majesty's justices of the peace in and for the county of &c. [as in the conviction], and acknowledged to owe to our said Lady the Queen the sum of _____ of lawful money of Great Britain, to be levied of his [or, "their"] goods and chattels, lands, and tenements ["respectively," if with sureties], to the use of our said Lady the Queen, her heirs and successors, if the said A. O. shall make default in the condition hereunder written:— (19). Recognizance on appeal against a conviction for sporting without a certificate, on 52 Geo. 3, c. 93, s. 13, Sch. L. (a).

Whereas the above bound A. O. has been this day duly convicted before me the said justice of the peace and commissioner [or, "us," &c.] upon the oath of A. W., a credible witness, for that he the said A. O., on &c., at &c., did use a certain dog [here state the offence as in the conviction], and adjudged by me [or, "us"] to pay the sum of £ _____ for the said offence. Now the condition of this

(a) See general form of recognizance to try an appeal against a conviction, ante, "Appeal;" and see

ante, p. 804, the enactment requiring the above recognizance.

22. Forms.

recognizance is such, that if the above A. O. shall appear at the next general quarter sessions of the peace, to be holden at _____, in and for the said county [“riding” or “division”] of _____, and shall then and there try such appeal, and abide the judgment of the said court of quarter sessions, and in case the said judgment of the said _____ shall be affirmed, pay the costs occasioned by such information, conviction, and appeal, as shall seem meet to and be awarded by the justices at such general quarter sessions, then this recognizance to be void, otherwise of force. A. O.

Acknowledged before me [or, “us”].

FORMS RELATIVE TO BUYING AND SELLING OF GAME.

(20). Licence to sell game (a).

At a special session of the justices of the peace of the county of _____ [or, “riding” &c. as the case may be], acting for the division of _____ [or otherwise, as the case may be], in the said county, holden at _____ in the said _____, on the _____ day of _____, in the year _____, We _____, being justices acting for the said _____, assembled at the said special sessions, do hereby authorise and empower A. B. of _____ [here insert the name, description, and place of residence, and, if more than one in partnership, say, “C. D., of &c., and E. F. of &c., being partners.”], being a householder [or, “householders,” or, “keeper” or “keepers of a shop or stall,” as the case may be], to buy game from any person authorised to sell game by virtue of an act passed in the second year of the reign of King William the Fourth, intituled “An act to amend the laws in England relative to game;” and we do also authorise and empower the said A. B. [or, “C. D. and E. F., being partners”] to sell at his [or, “their”] house [“shop” or “stall”] any game so bought, provided that the said A. B. [or, “C. D. and E. F., being partners”] shall affix to some part of the outside of the front of his [or, “their”] house [“shop” or “stall”], and there shall keep a board, having thereon, in clear and legible characters, his Christian name and surname [or, “their Christian names and surnames”], together with the following words, “Licensed to deal in Game.”

This licence will expire on _____ (Ante, p. 768.)

(Signed)

J. P. Justice of the Peace.
J. J. P. Justice of the Peace.

(21). Certificate to be issued by clerks of commissioners of taxes to persons licensed to deal in game (b).

Received from A. B. [or “C. D. and E. E., being partners”], residing at [“parish,” “township,” or, “place”], in the county of _____, (in exchange for this certificate), a receipt under the hand of G. H., one of the collectors of assessed taxes for the said [parish, &c.], for the sum of _____, being the duty chargeable on the said A. B. [or, “C. D. and E. F., being partners”] in respect of his [or, “their”] licence to deal in game.

Certified this _____ day of _____, in the year _____, in pursuance of an act passed in the second year of the reign of King William the Fourth, intituled “An act to amend the laws in England relative to game.”

This certificate will expire on _____

(Signed)

Clerk to the commissioners of assessed taxes for the division of _____, in the county of _____.

(22). Conviction on 1 & 2 Will. 4, c. 32, s. 19, against licensed person for dealing in game without having taken out the 2^d. certificate (c).

Be it remembered, that on the _____ day of _____, A. D. _____, at _____, in the parish of _____, in the county of _____, and in the district of _____ hereafter mentioned, A. O., of the parish of _____, in the county of _____, and in the district of _____ hereafter mentioned, was duly convicted by us [or, “me”], for that the said A. O. did, to wit, on &c., at the parish aforesaid, in the county aforesaid, and within the district aforesaid, having then and there obtained a licence to deal in game, under the provisions of

(a) This form is prescribed by the 1 & 2 Will. 4, c. 32 (see ante, p. 769).

(b) This form is prescribed by the

1 & 2 Will. 4, c. 32, (see ante, 769).

(c) See ante, pp. 763, 770.

a certain act of Parliament passed in the second year of the reign of his late Majesty King William the Fourth, intituled "An act to amend the laws in England relative to game," and the said licence being then and there, and at the time of the sale hereinafter mentioned of the game hereinafter mentioned, in force, unlawfully sell (a) to one _____, of &c., certain game, to wit, one hare [according to the fact], as a licensed dealer under the said statute, before he had obtained a certificate to empower him to deal in game under his said licence according to the form in the schedule (B.) annexed to the said statute, in exchange for a receipt from the collector or collectors of the assessed taxes for the said parish of _____, being the parish in which the said A. O. then and there resided, for the duty of 2*l.*, which by the said statute, is granted and made payable to her present Majesty for such certificate as aforesaid, as is directed by the said statute, and contrary to the form of the said statute; and we do adjudge that the said A. O. shall pay the sum of [20*l.*] (*ante*, p. 767) for the said offence. Given, &c. [Conclude as in form 3, *ante*, p. 812.]

22. Forms.

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, on the _____ day of _____, in the year aforesaid, at the parish aforesaid, in the county aforesaid (not having then and there obtained a game certificate, and not being then and there licensed to deal in game, according to the statute in such case made and provided), unlawfully offer for sale [or, "sell"] certain game, to wit [six partridges], to one E. F. of &c., contrary to the form of the statute in such case made and provided. And we do adjudge that the said A. O. shall for his said offence forfeit the sum of [12*l.*], being after the rate of [2*l.*] (c) for every head of game so offered for sale [or, "sold"] as aforesaid, and shall forthwith pay the said sum of [12*l.*]; together with the sum of [1*l.*] for costs (*ante*, pp. 789 and 812 n. (d)). And that in default &c. [Conclude as in form, *ante*, p. 812 (No. 3).]

(23). Conviction under s. 25, against uncertificated person for selling or offering to sell game without a licence (b).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, on the _____ day of _____, in the year of our Lord _____, at the parish aforesaid, in the county aforesaid (being then and there, and at the time of the offering for sale [or, "sale"] hereinafter mentioned, authorised to sell game under the statute in that case made and provided, by virtue of a game certificate), unlawfully offer for sale [or, "sell"] certain game, to wit [six partridges], to one E. F. of &c., the said E. F. not being then and there a person licensed to deal in game according to the said statute, and the said A. O. then and there and at the time of the said offering for sale [or, "sale"] well knowing that the said E. F. was not so licensed to deal in game as aforesaid, contrary to the statute in such case made and provided. And we do adjudge &c. [Conclude as in the preceding form, (No. 23).]

(24). Conviction against a certificated person for offering to sell game to one unlicensed to deal in it (d).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, on the _____ day of _____, in the year of our Lord _____, at the parish aforesaid, in the county aforesaid (not being then and there licensed to deal in game according to the statute in such case made and provided), unlawfully buy certain game, to wit [six partridges], from one E. F., of &c., the said E. F. then and there not being licensed to deal in game according to the said statute, nor having then and there affixed to the outside of the front of his house, shop, or stall, a board purporting to be the board of a person licensed to deal in game, contrary to the form of the said statute. And we do adjudge &c. [Conclude as in the form, *ante*, p. 812 (No. 3).]

(25). Conviction under s. 27, against unlicensed person for buying game of unlicensed dealer (*ante*, p. 771).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, on the _____ day of _____, in the year of our Lord _____, at the _____

(26). Conviction on s. 28, for buying, &c. game

(a) See the words of the act, *ante*, p. 769. Let the conviction agree with the fact.

(b) See *ante*, p. 770. See form, *Deac.* G. L. 129.

(c) The penalty is 2*l.* or less, for every head of game, with costs, (*ante*, p. 771).

(d) See *ante*, p. 770.

22. Forms.

from uncerti-
ficated or un-
licensed person
(*ante*, p. 771).

*parish aforesaid, in the county aforesaid (being then and there and at the time of the buying [or, "obtaining"] hereinafter mentioned of the game hereinafter mentioned, licensed to deal in game according to the statute in such case made and provided), unlawfully and knowingly buy [or, "obtain"] of and from one E. F., of &c., certain game, to wit [six partridges], the said E. F. then and there being a person not authorised to sell game for want of a game certificate, or of a licence to deal in game, contrary to the form of the said statute. And we do adjudge that the said A. O. shall for his said offence forfeit the sum of 10*l.* (a), and shall forthwith pay the said sum, together with the sum of £ (ante, p. 812, n. (d)) for costs. And that in default, &c. [Conclude as in the form, ante, p. 812 (No. 3).]*

(27). Conviction
against licensed
dealer for selling,
&c. game without
a board affixed to
his shop, &c. (b).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid (being then and there, and at the time of the offering for sale [or, "sale"] hereinafter mentioned, licensed to deal in game according to the statute in such case made and provided), unlawfully offer for sale [or, "sell"] to one E. F. of &c., certain game, to wit [six partridges], at the house [or, "shop," or, "stall"] of the said A. O., situate in the parish aforesaid, and county aforesaid, there not being at the time of such sale [or, "offer for sale"] there a board affixed to any part of the outside of the front of the said house [or, "shop," or, "stall"] having thereon, in clear and legible characters, his Christian name and surname, together with the following words, that is to say, "Licensed to deal in Game," contrary to the form of the said statute. And we do adjudge &c. [Conclude as in the preceding form, No. 26.]*

(28). Conviction
against licensed
dealer for affixing
a board denoting
his licence to
more houses than
one (b).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid (being then and there, and at the time of the affixing [or, "causing to be affixed"] hereinafter mentioned, of the board hereinafter mentioned, licensed to deal in game according to the statute in such case made and provided), unlawfully affix [or, "cause to be affixed"] a board having thereon, in clear and legible characters, his Christian name and surname, together with the following words, that is to say, "Licensed to deal in Game," to more than one house [or, "shop," or, "stall"] at the same time, that is to say, to a certain house [or, "shop," or, "stall"] of the said A. O. situate in the parish of , in the county of , and to a certain other house [or, "shop," or, "stall"] of one C. D. situate at , in the parish of , in the county of , contrary to the form of the said statute. And we do adjudge &c. [Conclude as in the form, *supra* (No. 26).]*

(29). Conviction
against a licensed
person for selling
game elsewhere
than his house,
&c. (*ante*, p. 771).

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid (being then and there and at the time of the sale hereinafter mentioned of the game hereinafter mentioned, licensed to deal in game according to the statute in such case made and provided, and having then and there and at the time of the said sale affixed to the outside of the front of his house ["shop," or "stall"], situate in the parish of , in the county of , a board having thereon, in clear and legible characters, his Christian name and surname, together with the words "Licensed to deal in Game"), sell certain game, to wit [six partridges], to one E. F. of &c., at the place other than the said house ["shop," or, "stall"] of him, the said A. O., to wit, at [the house of one G. H.] in the parish of , in the county of , contrary to the form of the said statute. And we do adjudge &c. [Conclude as in the form, ante, p. 819 (No. 26).]*

(30). Conviction
against unlicensed
person for pre-

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, on the day of , in the year of our Lord , at the parish*

aforesaid, in the county aforesaid (not being then and there licensed to deal in game according to the statute in such case made and provided), unlawfully assume [or, "pretend"] to be a person licensed to deal in game, by then and there affixing to the outside of the front of his house there situate a board, having thereon [let this agree with the fact], in clear and legible characters, his Christian name and surname, together with the words "Licensed to deal in Game;" contrary to the form of the said statute. And we do adjudge &c. [Conclude as in the form, ante, p. 819 (No. 26)].

22. Forms.

tending to be licensed (ante, p. 771).

[See forms as to, ante, p. 817].

(81). Appeal, &c.

FORMS RELATIVE TO TRESPASSERS.

SIR,—I do hereby give you notice, and require you not to enter, or cause or procure to be entered, any of my closes, lands, or premises, situate and being in the parish of _____, or elsewhere, in the county of _____, with horses, dogs, or otherwise, in order to beat for, follow, or pursue any game, or for any other purpose whatsoever; and in case you do not know the local situation of such my said closes, lands, and premises, I hereby give you notice, that the same will be pointed out and shown to you, upon reasonable application at my dwelling-house, situate at _____; and I do hereby further give you notice, that in case, after your being served with this notice, you shall commit any trespass upon any part of my said closes, lands, or premises, you will not only be proceeded against as a wilful and malicious trespasser, but will also be otherwise prosecuted for such offence according to law. Dated this _____ day of _____, in the year of our Lord _____ A. B.

To Mr. _____, and all others attempting to trespass on the above-mentioned lands.

[See the forms, ante, p. 811, &c.]

(82). Notice not to trespass, &c. (ante, p. 780).

[Commences as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O., on the _____ day of _____, between the beginning of the last hour before sunrise on that day and the expiration of the first hour after sunset on that day (ante, p. 792, that is to say, at eleven o'clock in the forenoon of the same day at the parish aforesaid, in the county aforesaid, unlawfully and wilfully did commit a trespass on a certain piece of land situate in the parish aforesaid and county aforesaid, and which piece of land was then and there called _____, and was then and there in the occupation of one A. B., of &c. (a), by then and there, and at the time of day aforesaid, unlawfully and wilfully entering [or, "being"] (ante, p. 775) on the said land, in search [or, "pursuit"] of game [or, "woodcocks," &c. ante, p. 773], without the leave, licence, or consent of the said A. B. (b), who had then and at the time the said A. O. entered [or, "was"] upon the said land as aforesaid, the exclusive right of killing the game upon such land; contrary to the form of the statute in such case made and provided (c). And I the said justice do adjudge that the said A. O. shall for his said offence forfeit the sum of 2l. together with the sum of _____ (ante, p. 812, n. (d)) for costs. And that in default, &c. [Conclude as ante, p. 812, (No. 3).]

(83). Information, summons, or warrant, under 1 & 2 Will. 4, c. 32, s. 30, for a trespass (ante, p. 773).

(84). Conviction under same sect., for trespassing in pursuit of game, &c. (ante, p. 773).

Be it remembered, that on the _____ day of _____, in the year of our
to wit. { Lord _____, at _____, in the parish of _____, in the county of _____,
A. O., of &c. [labourer], and T. O. of the same place [labourer], upon the infor-

(85). Conviction for a like offence, where the trespass was committed by five persons or more.

(a) The place where the trespass was committed should, it would seem, be described by name, abutments, or occupation. (See ante, p. 798.)

(b) See the proviso in the 30th section, ante, p. 773.

(c) Some particular trespassers are exempted by the 35th section of the act (ante, p. 777) from this mode of proceeding by summary conviction. But

as these exemptions are the subject of a distinct section in the act, they need not be negated in the statement of the offence in the conviction; but are matters which, if existing, the party accused must show by way of defence. (*R. v. Jukes*, 8 T. R. 542; *R. v. Jarvis*, 1 East's Rep. 646: note per Lord Mansfield, *Deac. G. L.* 141.)

22. Forms.

mation and prosecution of A. B., are and each of them is duly convicted before me J. P., esquire, one of her Majesty's justices of the peace for the said county (ante, p. 812 (No. 3)), for that the said A. O. and T. O., together, and together with three other persons to me the said J. P. as yet unknown, on the day of , in the year of our Lord , between the beginning of the last hour before sunrise on that day, and the expiration of the first hour after sunset on that day (a), that is to say, at the hour of [eleven] of the clock of the [forenoon] of the same day, with force and arms did commit a trespass on a certain close then and there in the occupation of the said A. B. then and there called (b), and situate in the parish aforesaid and county aforesaid, by then and there, and at the time of day aforesaid unlawfully and wilfully entering [or, "being"] together, and together with those persons, upon the said close in search [or, "pursuit"] of game, to wit , [or, "woodcocks," &c., ante, p. 773], without the leave, licence, or consent of the said A. B., who then and at the time the said A. O. &c. entered [or, "were"] upon the said land as aforesaid had the exclusive right of killing the game upon the said close (ante, p. 821, n. (b)), contrary to the form of the statute in such case made and provided. And I the said justice do adjudge that the said A. O. shall for his said offence forfeit the sum of 5l. (c), and shall forthwith pay the said sum together with the sum of £ (ante, p. 812, n. (d)) for costs. And that the said T. O. shall for his said offence also forfeit the sum of 5l., and shall forthwith pay the said sum together with the sum of £ for costs; and that in default of immediate payment by the said A. O. or T. O. of the said several sums of money so to be paid by each of them as aforesaid, they or he so making default as aforesaid shall be imprisoned [or, "imprisoned and kept to hard labour"] in the of , for the space of , unless the said several sums of money so to be paid by them or him as aforesaid shall be sooner paid (but not so as that either of them, the said A. O. or T. O. shall be imprisoned or kept in prison for the default of the other of them). And I direct that one moiety of each of the said sums of £ (the penalties) shall be paid to A. B., the person who hath informed and prosecuted for the same, and the other moiety thereof to , being one of the overseers of the poor of the said parish ["township," or, "place"] (ante, form No. 3) of , to be by him applied according to the directions of the statute in such case made and provided; and I order that the said sums of £ and £ for costs shall be paid to the said A. B. (the complainant). Given under my hand, the day and year first above mentioned. [See Notes to Form (No. 3), ante, p. 812.] J. P.

(36). Conviction on s. 31, against a trespasser for refusing to tell his name on being required to do so by the person entitled to the game (ante, p. 776).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O., on the day of , in the year of our Lord , between the beginning of the last hour before sunrise on that day, and the expiration of the first hour after sunset on that day (a), that is to say, at [ten] o'clock in the [forenoon] of the same day, at the parish aforesaid, in the county aforesaid, was found by one A. B., of &c., on a certain close then and there called (d), there situate, and then and there being in the occupation of one E. F. of &c., in search [or, "pursuit"] of game [or, "woodcocks," "snipes," "quails," "landrails," or "conies"],* the said A. B. then and there, and at the time of the requisition hereinafter mentioned, having the right of killing the game upon the said close by virtue of a certain reservation [this must agree with the fact] contained in a certain deed relating to the said game.* And the said A. B., being so entitled to the said game as aforesaid, did thereupon then and there, and before the said A. O. had left the said close, require the said A. O. forthwith to quit the said close, and also to tell his Christian name, surname, and place of abode, but the said A. O., after being so required as aforesaid, did then and there unlawfully refuse to tell his real name [or, "place of abode"] (e), contrary to the form of the statute in such case made and provided. And I,

(a) See ante, p. 792.

(b) Describe the close by name, abutments, or occupation. (See ante, p. 798.)

(c) The penalty is not exceeding 5l. on each of the trespassers.

(d) Describe the close by name, occupation, or abutments. (See ante, p. 798.)

(e) Let this accord with the circumstances of the case. (See ante, p. 776, and the next two forms.)

the said justice, do therefore adjudge that the said A. O. shall for his said offence forfeit the sum of 5*l.*, and shall forthwith pay the said sum, together with the sum of £ (ante, p. 812, n. (d)) for costs, and that in default, &c. [Conclude as in the form, ante, p. 812 (No. 3).]

22. Forms.

[Commence as ante, p. 822 (No. 36), to the second asterisk, but stating that "A. O. was found by G. H. of &c. and A. B. of &c.," instead of "the said A. B."—and the said G. H. being then and there, and at the time of the requisition hereafter mentioned, duly authorised by the said A. B. so to do, did thereupon then and there, and before the said A. O. had left the said close, require the said A. O. forthwith to quit the said close, and also to tell his Christian name, surname, and place of abode, but the said A. O., after being so required as aforesaid, did then and there unlawfully and wilfully continue upon the said close, without the licence of the said A. B., and against the will of the said G. H., contrary to the form of the statute in such case made and provided. And I, the justice, do therefore adjudge &c. [Conclude as in the last preceding form.]

(37). The like for continuing on the land after being required to quit it by a person authorised by the party entitled to the game (ante, p. 776).

[Commence as ante, p. 822 (No. 36), to the first asterisk, but stating that "A. O. was found by one E. F. of &c. and the said E. F.," instead of "one A. B. of &c."—and the said E. F., so being such occupier of the said close as aforesaid at the time of the requisition hereafter mentioned, did thereupon then and there, and before the said A. O. had left the said close, require the said A. O. forthwith to quit the said close, and also to tell his Christian name, surname, and place of abode; but the said A. O., after being so required as aforesaid, instead of giving a proper and correct description of his place of abode to the said E. F., did then and there unlawfully refuse to give any other description in that behalf than by then and there stating that he the said A. O. lived at ; the same description of his place of abode being so general as to be wholly illusory for the purpose of discovering the real place of abode of the said A. O., contrary to the form of the statute in such case made and provided. And I do therefore adjudge &c. [Conclude as in the form, ante, p. 822 (No. 36).]

(38). The like for giving an illusory description of his place of abode to the occupier of the land (ante, p. 776).

{ Be it remembered, that on the day of , in the year of our }
to wit. { Lord , at , in the parish of , in the county of }
aforesaid, A. O., of the parish aforesaid, in the county aforesaid, [labourer],
and T. O., of the same place, [labourer], are, upon the information and prosecution of A. B. of , severally convicted before us, J. B. and J. P., esquires, two of her Majesty's justices of the peace for the said county, (ante, p. 812 (No. 3)), for that the said A. O. and the said T. O., and three other persons to us the said justices as yet unknown, to the number of five together, on the day of , in the year of our Lord , between the beginning of the last hour before sunrise on that day, and the expiration of the first hour after sunset on that day, (ante, p. 792), to wit, at the hour of [eleven o'clock in the forenoon] of the same day, at the parish aforesaid, in the county aforesaid, were found by the said A. B. together on a certain close of E. F., esquire, then and there called , (see ante, p. 821, n. (a)), and situate in the parish aforesaid and county aforesaid, in search [or, "pursuit"] of game [or, "woodcocks," &c. ante, p. 773], he the said E. F. then and there, and at the time of the making use of the violence ["intimidation," or, "menace"] hereafter mentioned, having the right of killing the game upon the said close, and the said A. B. being then and there, and at the time of the making use of the said violence [&c., supra], the lawful gamekeeper of the said E. F. for the manor of G., in which the said close was situate, and the said E. F., being at the times aforesaid the lord of the said manor, and that the said A. O., being then and there and at the time of day aforesaid armed with a gun, did then and there, and at the time of day aforesaid, by violence ["intimidation," or, "menace"], unlawfully prevent [or, "endeavour to prevent"] the said A. B. from approaching the said A. O. and T. O., and the said other persons so found as aforesaid [let this agree with the fact, see ante, p. 776], for the purpose of requiring them [or, "the said "] to quit the said close whereon they were so found as aforesaid, contrary to the statute in such case made and provided [or, "for the purpose of requiring them, [or, "the said "] to tell their [or, "his"] Christian names, surnames, and places of abode [or, "Christian name, surname, and place of abode, contrary, &c." as above.] And

(39). Conviction under s. 32, against two persons for going out with 3 others to the number of 5 together, and deterring a gamekeeper from approaching them to order them off the land (ante, p. 776).

22. Forms.

that the said T. O. was then and there, at the time of day aforesaid, present, and did then and there, at the time of day aforesaid, unlawfully aid [or, "abet"] the said A. O. to commit the said offence, contrary to the statute in such case made and provided. And we do adjudge that the said A. O. shall for his said offence forfeit the sum of 5l., and shall forthwith pay the said sum, together with the sum of £ for costs, and that the said T. O. shall for his said offence also forfeit the sum of 5l. and shall forthwith pay the said last-mentioned sum, together with the sum of £ for costs. And that in default &c. [Conclude as in the form ante, p. 821 (No. 35).]

(40). The like for trespassing on the Queen's park or forest under s. 33 (ante, p. 776).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O., on the day of , A. D. , between the beginning of the last hour before sunrise on that day, and the expiration of the first hour after sunset on that day, (ante, p. 792), to wit, at the hour of [eleven] of the clock in the [forenoon] of the same day, at the parish aforesaid, in the county aforesaid, unlawfully and wilfully did commit a trespass upon her Majesty's park, then and there called , situate and being in the parish aforesaid, in the county aforesaid, by then and there at the time of day aforesaid unlawfully and wilfully entering [or, "being"] in the said park, in search [or, "pursuit"] of game, without being first duly authorised so to do, contrary to the form of the statute in such case made and provided. And I, the said justice, do adjudge that the said A. O. shall for his said offence forfeit the sum of 2l., and shall forthwith pay the said sum, together with the sum of £ (ante, p. 812, n. (d)) for costs. And that in default &c. [Conclude as in the form, ante, p. 812 (No. 3).]

FORMS RELATIVE TO THE KILLING &c. OF GAME &c. AT
IMPROPER TIMES OR IN AN IMPROPER MANNER.

(41). Information.

[See the form, ante, p. 811.]

(42). Summons.

[See the form, ante (title "Conviction," and p. 812).]

(43). Conviction on 1 & 2 Will. 4, c. 32, s. 3, for killing game on a Sunday or Christmas Day (ante, p. 768).

[Proceed as in the form, ante, p. 812, (No. 3), to the asterisk]—for that the said A. O. did, on Sunday [or, "Christmas Day"], the day of , in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and wilfully kill [or, "take"] certain game, to wit, [one hare] [or, "did use a dog," "gun," "net," or, "a certain engine, to wit, a " or, "a certain instrument, to wit, a "], for the purpose of killing [or, "taking"] game, to wit, , contrary to the statute in such case made and provided. And we do adjudge that the said A. O. shall for the said offence forfeit the sum of 5l. (a), and shall forthwith pay the said sum, together with the sum of £ (ante, p. 812, n. (d)) for costs, and that in default of immediate payment of the said sums, the said A. O. shall be imprisoned (b) [or, "imprisoned and kept to hard labour"] in the of , in the county aforesaid, for the space of one [or, "two"] (c) calendar month [or, "months"], unless the said sums shall be sooner paid. And we direct that the said sum of 5l. (d) shall be paid &c. [Conclude as ante, p. 812 (No. 3).]

(44). The like for killing partridges between 1st Feb. and 1st Sept. (ante, p. 768).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, between the first day of February in the year aforesaid and the first day of September in the year aforesaid, to wit, on the day of in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully and wilfully kill [or, "take"], to wit, [six partridges], contrary to the form of the statute in such case made and provided. And we do adjudge that the said A. O. shall for the said offence forfeit the sum of [6l.] (e), being after the rate of 1l.

(a) Not to exceed 5l., but may be less.

(b) See the 38th section, ante, p. 788.

(c) The time of imprisonment may be three calendar months if the penalty amounts to 5l. exclusive of costs, or 2 calendar months where it

does not amount to that sum. (See ante, p. 788).

(d) As to the application of the penalties, see ante, p. 788.

(e) Not to exceed the rate of 1l. for each head of game, but may be less.

for every head of game so killed [or, "taken"] as aforesaid, and shall forthwith pay the said sum, together with the sum of £ (ante, p. 812, n. (d)) for costs, &c. [Conclude as in the form, ante, p. 812 (No. 3).]

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[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, between the first day of February in the year aforesaid and the first day of October in the year aforesaid, to wit, on the day of in the year aforesaid, at the parish of P. in the county aforesaid, unlawfully and wilfully take [or, "kill"], to wit, [six pheasants], contrary to the form of the statute in such case made and provided. And we do adjudge &c. [Conclude as in the form, (No. 44), supra.]

(45). The like for killing pheasants between 1st Feb. and 1st Oct. (ante, p. 768).

[Commence as in the form, ante, p. 812, (No. 3), to the asterisk]—for that the said A. O. did, between the tenth day of December, in the year of our Lord , and the twentieth day of August (a), in the year of our Lord to wit, on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid (b), unlawfully and wilfully kill [or, "take"], to wit, six black game, contrary to the form of the statute in such case made and provided. And we do adjudge &c. [Conclude as in the form, supra (No. 44).]

(46). The like for killing black game between 10th Dec. and 20th Aug., not being in Somerset or Devon, or in New Forest (ante, p. 768).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, between the tenth day of December, in the year of our Lord , and the twelfth day of August, in the year of our Lord , to wit, on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid, unlawfully and wilfully kill [or, "take"], to wit, [six grouse], commonly called red game; contrary to the form of the statute in such case made and provided. And we do adjudge &c. [Conclude as in the form, supra (No. 44).]

(47). The like for killing grouse between 10th Dec. and 12th Aug. (ante, p. 768).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk]—for that the said A. O. did, on the day of , in the year of our Lord , at the parish aforesaid, in the county aforesaid, he the said A. O. not having then and there the right of killing the game upon certain land, to wit, the land of one E. F., situate in the parish aforesaid and county aforesaid, and then and there called (c), nor having then and there permission so to do in that behalf from the said E. F., he being then and there the person having such right in and upon the said land, unlawfully, wilfully, and knowingly, and without the permission of the said E. F., take out of the nest [or, "destroy in the nest"] then being upon such land, divers, to wit, [eight] eggs of a certain bird of game, to wit, of a bird of game called a [partridge] [or, "of a certain swan," or, "wild duck," "teal," or, "widgion"], then and there found, contrary to the form of the statute in such case made and provided. And we do adjudge that A. O. shall for the said offence forfeit the sum of [forty] shillings, the same being after the rate of five shillings (d) for every egg so taken [or, "destroyed"], and shall forthwith pay the said sum of [forty] shillings, together with the sum of (ante, p. 812, n. (d)) for costs. And that in default &c. [Conclude as in the form, ante, p. 812 (No. 3).]

(48). The like, on s. 24, for destroying the eggs of game, &c. (ante, p. 769).

[Commence as in the form, ante, p. 812 (No. 3), to the asterisk. The statement of the offence in this case may easily be framed from the preceding form. This conviction must also conclude as the last form.]

(49). Conviction on same section for having in possession the eggs of game, &c. (ante, p. 769).

(a) If the conviction be for killing black game in the county of Somerset or Devon, or in the New Forest, state, instead of the 20th day of August, the 1st day of September. (See ante, p. 768).

(b) If the conviction be for killing black game in the county of South-

ampton, then here negative the taking being in the New Forest, thus—"not being in the New Forest in the said county."

(c) See ante, p. 813, n. (d).

(d) Five shillings, or less, for every egg.

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(50). Conviction on third section for laying poison to kill game (*ante*, p. 768).

Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, on the* day of , *in the year of our Lord* , *at the parish aforesaid, in the county aforesaid, unlawfully and wilfully put [or, "cause to be put"] a certain poison [or, "poisonous ingredient"], to wit, a certain poison [or, "poisonous ingredient"] called* , *on certain open [or, "inclosed"] ground then and there in the occupation of A. B., and then and there called* (a), *the same ground being ground where game then usually resorted [or, "in a certain highway there situate and called* " [or, "leading from to ."] Give the highway some description], *with intent thereby then and there to destroy [or, "injure"] the game resorting to the said ground [or, "highway"], contrary to the form of the statute in such case made and provided. And we do adjudge that the said A. O. shall for the said offence forfeit the sum of [10l.], and shall forthwith pay, &c. [Conclude as in the form, *ante*, p. 812 (No. 3).]*

FORMS RELATING TO BUYING AND SELLING OF GAME, &c.

(51). Information. [See the form, *ante*, p. 811.]

(52). Summons or warrant. [See p. 812.]

(53). Conviction on 1 & 2 Will. 4, c. 32, s. 4, of a licensed dealer for selling or having game in his possession after ten days from the expiration of the season.

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that he the said A. O., did after the expiration of ten days (one inclusive and the other exclusive) from the first day of February (b), in the year aforesaid, to wit, on the* day of , *in the year aforesaid, at the parish aforesaid, in the county aforesaid, he, the said A. O., being then and there, and at the time of the sale [as the case is] hereinafter mentioned, a person duly licensed to deal in game, by virtue of the statute in such case made and provided, as therein mentioned, unlawfully sell to [or, "buy of"] one G. G. of* [or, unlawfully and knowingly have in his possession, "house," "shop," "stall," or, "contrivance"], [six] birds of game, to wit, [three] birds of game called [partridges], and three other birds of game, to wit, [three] birds of game called [pheasants], contrary to the statute in such case made and provided. And we do adjudge that the said A. O. shall for the said offence forfeit the sum of [6l.] (c), the same being after the rate of 1l. for every head of game so sold [or, "bought"] by him [or, "so found in his possession," &c.] as aforesaid, and shall forthwith pay the said sum, together with the sum of £ (*ante*, p. 812, n. (d)) for costs. And that in default &c. [Conclude as in form, *ante*, p. 812 (No. 3).]

(54). The like of a person not licensed to deal in game, for selling game after ten days from expiration of season.

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, after the expiration of ten days (one inclusive and the other exclusive) from the first day of February, in the year aforesaid (d), to wit, on the* day of , *in the year aforesaid, at the parish aforesaid, in the county aforesaid, he, the said A. O., not being then and there a person licensed to deal in game by virtue of the statute in such case made and provided, as therein mentioned, unlawfully sell to [or, "buy of"] one G. G. of* [six] birds of game, to wit, [six] birds of game called [partridges], contrary to the statute in such case made and provided. And we do adjudge &c. [Proceed as in the preceding form, (No. 53), to the end, *mutatis mutandis*.]

(55). The like of a person not licensed to deal in game, for having game in his pos-

[Commence as in the form, *ante*, p. 812 (No. 3), to the asterisk]—*for that the said A. O. did, after the expiration of forty days (one inclusive and the other exclusive), from the first day of February (e), in the year aforesaid, to wit, on the* day of , *in the year aforesaid, at the parish aforesaid, in the*

(a) See *ante*, p. 813 n. (d).

(b) Let this be the day on which the season for killing the game in question expired, according to the third section of the act, *ante*, p. 768.

(c) Not to exceed the rate of 1l. for each head, but it may be less.

(d) Let this be the day on which the season for killing the game in question expired, according to the third section of the act, *ante*, p. 768.

(e) The day on which the season expired. (See *ante*, p. 768.)

county aforesaid, he, the said A. O., not being then and there a person licensed to deal in game by virtue of the statute in such case made and provided, as therein mentioned, unlawfully and knowingly have in his possession ["house," or, "control"] [six] birds of game, to wit, [six] birds of game called [pheasants], the same or any or either of them not being birds or a bird of game then and there kept in a mew or breeding place, contrary to the form of the statute in such case made and provided. And we do adjudge &c. [Conclude as in the form, ante, p. 812 (No. 3)].

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session after forty days from the expiration of the season.

FORMS UNDER 9 GEO. IV. c. 69, AGAINST NIGHT POACHING.

Be it remembered, that on the day of , A.D. , at to wit. } in the parish of , in the county of , A. O. is convicted (56). Conviction before us, J. P. and S. P., two of her Majesty's justices of the peace for the said county,* for that the said A. O., within six calendar months now last past, (ante, p. 794), to wit, between the expiration of the first hour after sunset on the day of , A.D. , and the beginning of the last hour before sunrise on the day of , (ante, p. 792), in the year aforesaid, to wit, on the said day of , A.D. , about the hour of [eleven o'clock in the night] of that day, at the parish aforesaid, in the said county, did unlawfully and wilfully take [or, "destroy"] certain game, to wit, [six pheasants], in a certain close then and there called (ante, p. 813 n. (d)), and then in the occupation of one E. F., and situate in the parish and county aforesaid, contrary to the form of the statute in such case made and provided; and we the said justices, the said A. O. not having before the committal of the above offence thus offended, do therefore adjudge the said A. O. for his said first offence to be imprisoned in the house of correction at , in the county aforesaid, and there kept to hard labour for the period of [three] calendar months, and at the expiration of such period to find sureties, by recognizance, himself in the sum of 10l. and two sureties in the sum of 5l. each, or one surety in the sum of 10l., conditioned that he the said A. O. shall not so offend again for the space of one year then next following. And we further adjudge the said A. O., in case he shall not find such sureties as aforesaid, to be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties shall be sooner found. Given under our hands, the day and year first above mentioned.

[Commence as in the preceding form]—for that he, the said A. O., within six calendar months now last past, to wit, between the expiration of the first hour after sunset, on the day of , A.D. , and the beginning of the last hour before sunrise on the day of , (ante, p. 792), in the year aforesaid, to wit, on the day and year last aforesaid, about the hour of [one of the clock in the morning] of that day, at the parish aforesaid, in the county aforesaid, did unlawfully enter [or "unlawfully was upon"] a certain close then and there called , then in the occupation of one C. D., and situate in the parish aforesaid, and county aforesaid, with a gun ["net," or, "a certain engine, to wit, a " , or, "a certain instrument, to wit, a "], for the purpose of then and there, before the beginning of the last hour before sunrise on that day, as aforesaid, taking [or "destroying"] game, contrary to the form of the statute in such case made and provided. And we the said justices, &c. [Conclude as in the preceding form.]

(57). The like, for entering land by night armed for taking game (ante, p. 792).

[Proceed to state the second offence as in either of the two preceding forms, according as it may be, to the words "contrary to the form of the statute in such case made and provided."] And it is now, that is to say, on the day and year first aforesaid, proved before us the said justices, that the said A. O. was heretofore, to wit, on the day of , in the year of our Lord , duly convicted before J. J. and J. T., esquires, two of her Majesty's justices of the peace for the county of , for that he the said A. O., within six calendar months then last past, to wit, between the expiration of the first hour after sunset

(58). The like for a second offence in either of the two last cases (ante, p. 792).

(a) The act prescribes the formal parts of this conviction.

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J. P.
J. J.

(59). Indictment on 9 Geo. 4, c. 69, s. 1, for a third offence of night poaching after two convictions (*ante*, p. 792).

to wit. } The jurors for our Lady the Queen upon their oath present, that
A. O. on the day of in the year of our Lord ,
at the parish aforesaid, in the county aforesaid, was duly convicted before J. P. and J. J., esquires, two of her Majesty's justices of the peace for the said county, for that [here set out the first conviction in the past tense as it is set out in the last form]. And the jurors aforesaid, upon their oath aforesaid, do further present, that he the said A. O. being so convicted as aforesaid, afterwards, to wit, on the day of in the year of the reign aforesaid, at , in the county aforesaid, was a second time duly convicted before P. P. and J. P., esquires, two of her Majesty's justices of the peace for the said county, for that [here set out the second conviction in the past tense, according to its form or the substance of it, which may be thus, "he the said A. O., within six calendar months then last past, to wit, between the expiration of the first hour after sunset on the day of , A. D. , and the beginning of the last hour before sunrise on the day of , in the year aforesaid, to wit, on the day and year last aforesaid, about the hour of [one of the clock in the morning] of that day, at the parish of , in the said county, did unlawfully enter [or, 'unlawfully was upon'] certain land then and there called , then in the occupation of one , and situate in the parish aforesaid and county aforesaid, with a gun [as in the conviction], for the purpose of then and there, before the beginning of the last hour before sunrise on that day as aforesaid, taking [or, 'destroying'] game, contrary to the form of the statute in such case made and provided. And the said A. O. was thereupon then and there, by the said P. P. and J. P., adjudged for his said last-mentioned offence to be imprisoned in the house of correction at , in the said county, and there kept to hard labour for the period of calendar months, and at the expiration of such period to find sureties by recognizance, himself in the sum of 20*l.*, and two sureties in the sum of 10*l.* each, or one surety in the sum of 20*l.*, conditioned that he the said A. O. should not so offend again for the space of two years then next following, and that in case he should not find such sureties as last aforesaid, he should be further

imprisoned and kept to hard labour for the space of one year, unless such sureties should be sooner found"]. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. O. afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months (see ante, p. 794) now last past, to wit, between the expiration of the first hour after sunset on the day of _____, in the year of the reign of our said Lady the now Queen, and the beginning of the last hour before sunrise (a) on the day of _____, in the year aforesaid, to wit, on the day and year last aforesaid, about the hour of [two of the clock in the morning] of that day, with force and arms, at the parish of _____, in the county aforesaid, did unlawfully enter [or, "was unlawfully upon"] certain other land, then and there called _____ (b), situate in the parish aforesaid and county aforesaid, and then and there being in the occupation of O. O., with a gun ["net," or, "a certain engine, to wit, a _____," or, "a certain instrument, to wit, a _____"]. for the purpose of then and there, before the beginning of the last hour before sunrise as aforesaid, taking [or, "destroying"] game, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

{ The jurors for our Lady the Queen, upon their oath present, that to wit. } C. D., before the commission of the assault hereinafter mentioned, to wit, between the expiration of the first hour after sunset, on the day of _____, in the year of our Lord _____, and the beginning of the last hour before sunrise on the day of _____, in the year aforesaid, to wit, on the day and year last aforesaid, about the hour of [two of the clock in the morning] of that day, (ante, p. 792), at the parish aforesaid, in the county aforesaid, was unlawfully upon certain land in the parish aforesaid and county aforesaid, then and there called _____ (d), and then and at the times after mentioned in the occupation of one E. F., of &c., with a gun ["net," &c., (ante, p. 827, No. 57)], for the purpose of then and there, before the beginning of the last hour before sunrise on that day as aforesaid, taking [or "destroying"] game, contrary to the form of the statute in such case made and provided; and that the said C. D. was then and there, before the beginning of the last hour before sunrise on that day as aforesaid, in the said land, found committing the said offence by one S. S., then and at the time of the assault [or, "offering of violence"] hereinafter mentioned the servant of the said E. F. (e), the said S. S. then and there, and at the time of the said assault [&c.], having lawful authority to seize and apprehend the said C. D.,* and that the said C. D. with the gun aforesaid (f), which he the said C. D. in both his hands then and there held, did then and within twelve calendar months now last past, and there, and upon the said land, unlawfully assault and beat the said S. S., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown, and dignity. [Add a count for a common assault, see "Assault."] (60). Indictment on the 9 Geo. 4, c. 69, s. 2, against a night poacher for assaulting a party authorised to apprehend him (c).

[Commence as in the preceding form to the asterisk, and then thus:] And that the said C. D. then and there from the said land did escape into certain other land there situate, and then and there called _____ (g), and the said S. S. did then and there pursue the said C. D. into the said last-mentioned land, for the purpose of then and there seizing and apprehending him the said C. D., he the said S. S. having then and there lawful authority as aforesaid so to do, and (61). Indictment under same statute, for a similar assault, when immediate pursuit was made after the poacher.

(a) See *Rex v. Riley*, 1 *Lewin's C. C.* 149; and *per Gurney, B.*, in *Rex v. Penson*, *Id.* 154; ante, p. 792.

(b) See ante, p. 813, n. (d).

(c) See ante, p. 793.

(d) See ante, p. 798.

(e) Let this agree with the fact. See by whom the offender must be found, ante, p. 795.

(f) The words of the statute are, "and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever," &c. (See ante, p. 793). Let the above allegation agree with the fact.

(g) See ante, p. 798.

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that he the said S. S. being then and there about to seize and apprehend the said C. D. for the offence aforesaid upon the said last-mentioned land, the said C. D. with the gun aforesaid &c. [Conclude as in the preceding form]. [This count may be joined with one on the ninth section, ante, p. 797.]

(62). Indictment on 9 Geo. 4, c. 69, s. 9, against three or more for entering land in the night armed for the purpose of taking game (a).

The jurors for our Lady the Queen, upon their oath present, that to wit. { A. O., C. D., and E. F., and divers other evil disposed persons (b) to the number of three and more, to the jurors aforesaid unknown, together, between the expiration of the first hour after sunset on the day of , in the year of our Lord , and the beginning of the last hour before sunrise on the day of in the year aforesaid, to wit, on the day and year last aforesaid, about the hour of [two of the clock in the morning] of that day (c), at the parish aforesaid, in the county aforesaid, the said (d) being then and there before the beginning of the last hour before sunrise on that day as aforesaid, and at the time of the entry hereinafter mentioned, upon the land hereinafter mentioned [or, "at the time the said A. O., &c. were unlawfully upon the land hereinafter mentioned, as hereinafter mentioned," (ante, p. 797)], armed with a gun, ["cross-bow," or, "with a certain firearm, to wit, a " or, "bludgeon," or, "a certain offensive weapon, to wit, a " (e)], did unlawfully enter (f) [or, "were unlawfully upon"] certain land then and there in the occupation of one A. B., then and there called (g), and there situate, for the purpose of then and there, and at the time of night aforesaid, taking [or, "destroying"] game, to wit, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. [Add other counts as the case may suggest.]

FORMS RELATING TO DEER STEALING, &c.

(63). Conviction on 24 & 25 Vict. c. 96, s. 12, for stealing, &c. deer in inclosed land, &c. (ante, p. 800).

[Commencement as usual, as ante, p. 812, (No. 3)]—on the day of , A. D. , at the parish of , in the county of , in a certain inclosed land (h), then and there called , there situate, and then in the occupation of A. B. (i), wherein deer had been and then were usually kept, unlawfully, wilfully, and feloniously did course (k) one deer, of the value, to wit, of 5l., the property of the said A. B., then and there and in the said inclosed land kept and being, against the form of the statute in that case made and provided. [And conclude as ante, p. 812, (No. 3), to the end].

(64). Indictment for a like offence (ante, p. 800).

The jurors for our Lady the Queen, upon their oath present, that to wit. { C. D., on the day of , in the year of our Lord , in certain inclosed land in the parish of , in the county of (h), in the occupation of A. B., wherein deer had been, and then were usually kept, unlawfully, wilfully, and feloniously did course (k) one deer of the value, to wit, of 5l., then the property of the said A. B., then and there and in the said inclosed land kept and being, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. [Add other counts as the case may suggest.]

(65). Conviction on the same statute for killing,

{ Be it remembered, that on, &c., at &c., C. D., late of &c. is convicted before me, J. P., one of her Majesty's justices of the peace for the

(a) See the act, ante, p. 797.

(b) Or if other persons be known, here name them, thus, "A. B. and C. D. and divers," &c.

(c) See ante, p. 792.

(d) Some of the party must be armed, ante, p. 798.

(e) See ante, p. 798.

(f) See as to the entering and being upon the land being several offences, ante, p. 797, and what constitutes an entry, *Id.*

(g) See ante, p. 798.

(h) The words of the act are, "in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept." (Ante, p. 800.) Let the above averment agree with the fact.

(i) See ante, p. 798.

(k) The words of the act are, "unlawfully and wilfully course, hunt, snare or carry away, or kill or wound, or attempt to kill and wound." (Ante, p. 800.) Let the above averment agree with the fact.

said county, for that the said C. D., on &c., at the parish of , in the county of , in a certain uninclosed part of a certain forest ["chase" or "purlieu"] then and there called , (ante, p. 800), there situate, one deer of the value of 40s., then there and then in the said uninclosed part of the said forest ["chase" or "purlieu"] kept and being in the said uninclosed part of the said forest ["chase" or "purlieu"] unlawfully and wilfully did course (b), against the form of the statute in that case made and provided, the said C. D. not having before the committal of the above offence as aforesaid been convicted of any offence, relating to deer, for which a pecuniary penalty is by the said statute imposed, I, the said J. P., do therefore adjudge the said C. D., for his said offence, to forfeit and pay the sum of [50l.] and also to pay the sum of shillings* (c) for costs, and in default of immediate payment, to be imprisoned in the [and there to be kept to hard labour] for the space of calendar months, unless the said sums shall be sooner paid; and I direct that the said sum of 50l. shall be paid to A. I., of , one of the overseers of the poor of the said parish of , in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and I order that the sum of shillings for costs shall be paid to [the complainant]. Given under my hand and seal the day and year first above mentioned. J. P.

22. Forms.

&c. deer in an uninclosed forest, &c. (a).

[Commencement as usual, ante, 18]—on &c., at &c., in a certain uninclosed part of a certain forest ["chase" or "purlieu"], then and there called , (see ante, p. 813, n. (d)), there situate, one deer, of the value of 40s., then there and then in the said uninclosed part of the said forest ["chase" or "purlieu"] kept and being, unlawfully, wilfully, and feloniously did course (d), against the form of the statute in that case made and provided, he, the said C. D., having been previously, to wit, on &c., convicted before J. P., one of her Majesty's justices of the peace in and for the said county, of having, to wit, on the day of , in the parish aforesaid, and county aforesaid, in the said uninclosed part of the said forest, unlawfully and wilfully coursed (d) a certain other deer, [describing the facts as above]. And you the said keeper, &c. [as usual, as ante, p. 817, to the end].

(66). Commitment on like statute for second offence, killing, &c. deer in an uninclosed forest, &c.

[Commencement, setting out the conviction to the words]—against the form of the statute in such case made and provided; and the said J. P., therefore adjudged the said A. O., for his said offence, to forfeit and pay the sum of [50l.], and also to pay the sum of ten shillings for costs; and in default of immediate payment, to be imprisoned in , there to be kept to hard labour for the space of six calendar months, unless the said sums should be sooner paid [following the conviction]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. O., being so convicted as aforesaid, afterwards, on the day of , in the year aforesaid, in a certain uninclosed part of the said chase ["forest" or "purlieu"], situate as aforesaid, one other fallow deer, of the price of 40s., then there, and then in the said last-mentioned uninclosed part of the said chase ["forest" or "purlieu"] kept and being, unlawfully, wilfully, and feloniously did course (d), against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

(67). Indictment for such a second offence.

to wit. } To the constable of , and others whom this may concern.

Whereas, A. I., of &c., hath this day made oath before me, J. B., esq., one of

(68). Warrant on s. 14 to search

(a) See the enactment, ante, p. 800. The act gives the formal parts of the conviction. See it, post, tit. "Larceny." An information may be readily framed from this form.

(b) See note (k), ante, 830.

(c) If time be given for the payment of the penalty, the form of the conviction may be the same as above to the* and then thus: [for costs; and I order that the said sums shall

be paid by the said C. D. on or before the day of next; and I direct that the said sum of [50l.] shall be paid, &c. [and conclude as in the above form to the end].

(d) The words of the statute are, "course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound." (See ante, p. 800.) Let the above averment agree with the fact.

22. Forms.
for venison or
engines, &c. (a).

her Majesty's justices of the peace in and for the said county, the said A. I. being a credible witness in this behalf, that he the said A. I. hath reasonable cause to suspect and doth suspect that C. D. of _____, in the same county, [labourer], hath in his possession [or, "on his premises, situate at _____ and with his knowledge,"] a deer, or some part thereof, ["any deer, or the head, skin, or other part thereof, or any snare, or engine, for the taking of deer," are the words of the statute]. These are, therefore, in the name of our Lady the Queen, to authorise and require you, with necessary aid and proper assistants to enter [in the day time] into the dwelling-house and premises of the said C. D., at _____ aforesaid, in the county aforesaid, and there diligently to search for the said deer, or part thereof, and if the said deer, or any part thereof, shall be found upon search, that you bring the same, and also the body of the said C. D., before me, or some other of her Majesty's justices of the peace for the county aforesaid, to be disposed of and dealt withal according to law. Herein fail you not. Given under my hand and seal at _____, in the county aforesaid, this _____ day of _____, A.D. _____.

J. P. (L. S.)

(69). Conviction
on sect. 27 for not
accounting for
possession, &c. of
venison, &c. (b)

Be it remembered, that on &c., at _____, in the county of _____, C. D. to wit, _____ } is convicted before me, J. P., one of her Majesty's justices of the peace for the said county, for that he, the said C. D., on &c., at the parish of _____, &c., had in his possession [or, "on his premises at _____ aforesaid, and with his knowledge"] a part of a deer, to wit, _____ [or, "snare," &c., see No. 68]; and that upon the said part of the said deer [or, &c., see No. 68] being found in the possession [or, "on the said premises"] of the said C. D. as aforesaid, by virtue of a certain search warrant, and the said C. D. being carried before me, the said J. P., now here as such justice as aforesaid, the said C. D. doth not satisfy me, the said J. P., that he came lawfully by the said part of the said deer, [or where a snare or engine for taking deer has been found, "that he hath or then had a lawful occasion for such snare [or, 'engine'], and that he did not keep the same for any unlawful purpose"], but hath altogether failed in so doing against the form of the statute in that case made and provided; and I, the said J. P., adjudge the said C. D. for his said offence to forfeit and pay the sum of [20l.], and also to pay the sum of _____ shillings* (ante, p. 812, n. (d)) (c) for costs, and in default of immediate payment, to be imprisoned in the _____, [and there kept to hard labour], for the space of _____ calendar months (d), unless the said sums shall be sooner paid; and I direct that the said sum of [20l.] shall be paid to A. I. of _____ aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided: and I order that the said sum of _____ shillings for costs shall be paid to [the complainant]. Given under my hand and seal the day and year first above mentioned.

J. P. (L. S.)

(70). Summons on
s. 14, against
person through
whose hands such
venison may have
passed (c).

To the constable of _____, and others whom this may concern.

Whereas lately, upon a part of a deer, to wit, _____, being by virtue of a search warrant found in the possession [or, upon "the premises"] of one C. D., at _____, in the county aforesaid, and the said C. D. being thereupon brought before me J. P., one of her Majesty's justices of the peace for the county aforesaid, I was informed and given to understand that E. F., of _____, in the county aforesaid, [labourer], had had possession thereof, ["the person from whom the same shall have been first received, or who shall have had possession thereof"]. These are, therefore, to require you forthwith to summon the said E. F. to appear before me, at _____

(a) See the act, ante, p. 800.

(b) The act prescribes the formal parts of this conviction.

(c) If time be given for payment of the penalty, &c. the form of the conviction may be the same as the above to the* and then thus [for costs: and I order that the said sums

shall be paid by the said C. D. on or before the _____ day of _____ next, and in default of payment on that day to be imprisoned, &c.] Conclude as in the above form to the end.

(d) See the 14th sect., ante, p. 800.

(e) See ante, p. 800.

in the said county, on &c., at the hour of, &c., o'clock in the forenoon of the same day, to answer to the said information, and to satisfy me that he hath come lawfully by the said part of the said deer, and to be further dealt with according to law; and be you then there to certify what you shall have done in the premises. Herein fail you not. Given under my hand and seal this day of _____, in the year of our Lord _____.

22. Forms.

J. P. (L. s.)

Be it remembered, that on &c., at &c., E. F. is convicted before me, (71). Conviction to wit. } J. P., one of her Majesty's justices of the peace for the said county, for thereon (a). that on &c., at &c., C. D., late of &c., had in his possession [or, "on his premises, at &c., and with his knowledge"] a part of a deer, to wit, _____, and upon the said part being found in his possession [or, "said premises"] as aforesaid, by virtue of a search warrant, the said C. D. was on &c., at &c., brought before me, the said justice, and was required by me to satisfy me that he came lawfully by such part of the said deer, when he then and there satisfied me he had come lawfully by the same, and he was not nor is liable to conviction under the statute in that case made and provided; and I, the said J. P., was then and there informed and given to understand that the said E. F., of &c., had had possession thereof; and thereupon I, the said justice, then and there duly summoned the said E. F. to appear before me on &c., at &c., for the discovery of the party who actually killed or stole the said deer, to satisfy me that he had come lawfully by the said part of the said deer, and to be further dealt with according to law; and also for that the said E. F., on &c., at &c., had possession of the said part of the said deer, and that the said E. F., although duly summoned by me, as such justice as aforesaid, hath not appeared before me, or satisfied me that he came lawfully by the said part of the said deer [or, "that the said E. F. now appeareth before me, having been duly summoned for that purpose, but doth not satisfy me, the said J. P., that he came lawfully by the said part of the said deer"], against the form of the statute in that case made and provided; and I, the said J. P., adjudge the said E. F. for his said offence to forfeit and pay the sum of, &c. [Conclude as in form (No. 69), ante, p. 832.] (b).

J. P. (L. s.)

Be it remembered, that on, &c., at _____, in the county of _____, (72). Conviction to wit. } C. D. is convicted before me, J. P., one of her Majesty's justices of the on 24 & 25 Vict. peace for the county aforesaid, for that he, the said C. D., on &c., at the parish c. 96, s. 15, for of &c., in a part of a certain forest, then and there called _____ (c), (see ante, setting snares to p. 821, n. (a)), there situate, unlawfully and wilfully did set [or, "use"] a certain take deer. snare, [or, "engine,"] called a _____, for the purpose of taking [or, "killing"] deer, against the form of the statute in that case made and provided; and I, the said J. P., adjudge the said C. D. for his said offence to forfeit and pay the sum of [20l.], and also to pay the sum of _____ shillings* (d) for costs, and in default of immediate payment, to be imprisoned in the _____ (e), [and there kept to hard labour], for the space of _____ calendar months (f), unless the said sums shall be sooner paid; and I direct that the said sum of [20l.] shall be paid to A. I. (g),

(a) See ante, p. 787. The act prescribes the formal parts of the conviction.

(b) See preceding page, n. (c).

(c) The words of the enactment are, "in any part of any forest, chase, or purlieu, whether such part be inclosed or not; or in any fence or bank dividing the same from any land adjoining; or in any inclosed land where deer shall be usually kept." (See ante, p. 800.) Let the conviction agree with the circumstances of the case.

(d) If time be given for payment of the penalty, &c. the form of the

conviction may be the same as the above to the * and then thus [for costs; and I order that the said sums shall be paid by the said C. D. on or before the _____ day of _____ next; and in default of payment on that day to be imprisoned, &c.] Conclude as in the above form to the end.

(e) The house of correction, or county gaol for the county where the offence was committed. (See ante, 789).

(f) See the 15th sect., ante, p. 801.

(g) See the 14th sect., ante, p. 800.

22. Forms.

of _____, one of the overseers of the poor of the parish of _____, aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and I order that the said sum of _____ shillings for costs shall be paid to _____, [the complainant]. Given under my hand and seal the day and year first above mentioned.

J. P. (L. S.)

(73). Conviction on same section for pulling down park fences, &c.

Be it remembered, that on, &c., at, &c., C. D., late of &c., is convicted to wit. } victed before me, J. P., one of her Majesty's justices of the peace for the county aforesaid, for that he the said C. D., on &c., at the parish of &c., a part, to wit, twenty feet of the fence of certain land then and there called _____, then in the occupation of one A. B. (see ante, pp. 775—79, there situate, wherein deer were then and at the time of the destruction hereafter mentioned of the said part of this said fence kept, unlawfully and wilfully did destroy, against the form of the statute in that case made and provided; and I the said J. P. do therefore adjudge the said C. D. for his said offence to forfeit and pay, &c., [as in last precedent to the end].

(74). Commitment on 24 & 25 Vict. c. 96, s. 16, for assaulting, &c. a deer-keeper (a).

[Commencement as usual, ante, "Commitment." The statement of offence in this case may easily be framed from the next form.]—And you the said keeper, &c. [as usual, as ante, p. 817, to the end.] (See, as to commitments in general, ante, tit. "Commitment.")

(75). Indictment for a like offence (a).

The jurors for our Lady the Queen upon their oath present, that to wit. } A. O., on the _____ day of _____, in the _____ year of our Lord _____, into certain inclosed land, in the parish of _____, and the county of _____, [or, "into a certain inclosed" or, "uninclosed" "forest," "chase," or, "purlieu"], then in the occupation of A. B., and there situate (b), wherein deer had been and then were usually kept, unlawfully did enter with intent then and there and in the said inclosed land [according to the fact] unlawfully and feloniously (c) to hunt (d) deer; and that T. T. then, and at the time of the demand hereafter mentioned, and there being a person intrusted with the care of the said deer (e) then and there being, and then in the said inclosed land being [as the case may be] then and there and in the said inclosed land [according to the fact], after the said A. O. had so entered into the said inclosed land [as the case may be] as aforesaid, and whilst he the said A. O. was and remained in the said inclosed land [as the case may be], which he had so entered for the purpose aforesaid, did lawfully and duly demand of and from the said A. O. a certain gun (f) which he the said A. O. then, and at the time of the said demand, and there, and in the said inclosed land ["chase," &c., according to the fact], had in his possession (g), and did then and there and in the said inclosed land [according to the fact (h)], the said A. O. failing to deliver up after such demand as aforesaid the said gun ["dog," &c., according to the fact], and altogether refusing so to do, attempt to seize and take the said gun ["dog," &c., according to the fact] for the use of the said A. B., then the owner of the said deer, as he lawfully might for the cause aforesaid; and that the said A. O. then and there and

(a) See the enactment, ante, p. 801.

(b) See ante, p. 775.

(c) If the defendant entered into a forest, chase, or purlieu not inclosed, omit the word "feloniously."

(d) The words of the act are, "hunt, course, wound, kill, snare, or carry away any deer." (See ante, p. 800.) The indictment should agree with the fact.

(e) "Every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not," are the words of the act. (See ante, p. 801.) This averment should be stated according to

the fact.

(f) The words of the act are, "gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer." (See ante, p. 801.) Let this averment agree with the fact.

(g) If it was a dog that was demanded here, instead of stating "had in his possession," state, "brought for hunting," "coursing," or, "killing deer," [according to the fact].

(h) See ante, p. 801, as to seizing the gun, &c. in some other place, upon pursuit made.

in the said inclosed land [according to the fact], with force and arms, in and upon the said T. T., then and there, and at the time of the beating [or, "wounding"] next hereafter mentioned, being a person intrusted with the care of the said deer within the said inclosed lands [according to the fact] as aforesaid, and then and there, and at the time of the beating [or, "wounding"] next hereafter mentioned, being in the due execution of his duty as aforesaid, and of the powers given to him in that behalf by the statute in that case made and provided, unlawfully and feloniously did make an assault, and him the said T. T. unlawfully and feloniously did beat [or, "wound"], against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. [2nd count.] And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. O., on the day aforesaid, and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said T. T., the said T. T. then and there, and at the time of the assault and beating [or, "wounding"] hereafter mentioned, being a person intrusted with the care of deer in certain other inclosed land [according to the fact], then and there in the occupation of _____, and as aforesaid situate, wherein deer had been and then were usually kept, and then and there, and at the time of the said assault and beating [or, "wounding"], being in the due execution of the powers given to him in that behalf by an act of Parliament made and passed in the eighth year of the reign of his late Majesty King George the Fourth, intituled "An act for consolidating and amending the laws in England relative to larceny and other offences connected therewith," unlawfully and feloniously did make an assault, and him the said T. T. then and there unlawfully and feloniously did beat [or, "wound"]; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

22. Forms.

FORMS RELATING TO HARE OR CONEY STEALING.

[Commencement as usual, as ante, p. 817] on &c., in the night-time, to wit, about the hour of eleven o'clock in the night of the same day, at &c., in a certain warren [or, "ground"] of A. B., then and there called _____ and there situate, then and at the time of the killing [or, "taking"] hereafter mentioned of the conies [or, "hares"] lastly hereafter mentioned, lawfully used for the breeding [or, "keeping"] of conies [or, "hares"] five conies [or, "hares"], then and there in the said warren and ground unlawfully and wilfully did take [or, "kill"], against the form of the statute in that case made and provided. And you the said keeper, &c. [As usual, as ante, p. 817, to the end.]

(76). Commitment on 24 & 25 Vict. c. 96, s. 17, for killing, &c. hares or conies in the night-time (a).

to wit. } The jurors for our lady the Queen upon their oath present, that C. D., on the _____ day of _____, in the _____ year of the reign of our lady the now Queen Victoria, in the night-time, that is to say, about the hour of eleven o'clock in the night of the said day, at the parish aforesaid, in the county aforesaid, in a certain warren [or, "ground"] of A. B., then and there called _____ (b), and there situate, then and at the time of the taking [or, "killing"] hereafter mentioned of the conies [or, "hares"] lastly hereafter mentioned, lawfully used for the breeding [or, "keeping"] of conies [or, "hares"] two conies [or, "hares"] then and there being found then and there in the said warren [or, "ground,"] unlawfully and wilfully did take [or, "kill"], against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity. [Add other counts as the case may suggest.]

(77). Indictment for like offence.

to wit. } Be it remembered, that on &c., at _____, in the county of _____, C. D. is convicted before me, J. P., one of her Majesty's justices of the peace for the said county, for that he the said C. D., on &c., in the day-time of the said day, to wit, about the hour of [six] of the clock in the morning of the same day, at &c., in a certain warren [or, "ground"] then in the occupation of _____

(78). Conviction on 24 & 25 Vict. c. 96, s. 17, for taking hares or conies in breeding grounds in the day-time (c).

(a) See ante, p. 792.

(b) See ante, p. 775.

(c) See the enactment, ante, p. 801.

The act prescribes the formal parts of the conviction.

22. Forms.

one A. B., then and there called (a), and there situate, then and at the time of the taking [or, "killing"] hereafter mentioned of the conies [or, "hares"] lastly hereafter mentioned, lawfully used for the breeding [or, "keeping"] of conies [or, "hares"] five conies [or, "hares"] then and there being found then and there and in the said warren [or, "ground,"] unlawfully and wilfully did take [or, "kill"] against the form of the statute in that case made and provided. And I, the said J. P., adjudge the said C. D. for his said offence, to forfeit and pay the sum of _____ pounds, and also to pay the sum of _____ shillings* (b) for costs, and in default of immediate payment to be imprisoned in the house of correction [or, "county gaol"] of the said county, and there kept to hard labour for the space of _____ calendar months, unless the said sums shall be sooner paid: and I direct that the said sum of _____ pounds shall be paid (c) to E. F., one of the overseers of the poor of the said parish of _____, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided: and I order that the sum of _____ shillings for costs be paid to _____ [the complainant]. Given under my hand and seal the day and year first above mentioned. J. P. (L. s.)

(79). The like, for setting snares for taking hares or conies in warrens or breeding grounds.

[The commencement may be framed from the preceding form (No. 78)—unlawfully and wilfully did set a snare for the taking of conies, for the purpose and with the intent to take conies in the said warren [or, "ground,"] against the form of the statute in that case made and provided; and I, the said J. P., do therefore adjudge &c. [as in the last form to the end].

FORMS RELATING TO PIGEONS.

(80). Conviction on 7 & 8 Geo. 4, c. 29, s. 33, for killing a house-pigeon (d).

to wit. } Be it remembered, that on &c., at _____, in the county of _____, C. D. is convicted before me J. P., esquire, one of her Majesty's justices of the peace for the said county, for that he the said C. D., on &c., at &c., one house-pigeon, of the value of [sixpence], then the property of A. B., of &c., then and there being found, unlawfully and wilfully, but not feloniously, did kill ["wound" or, "take"] against the form of the statute in that case made and provided. And I, the said J. P., adjudge the said C. D. for his said offence, to forfeit and pay the sum of [two] pounds, over and above the value of the said pigeon so killed and taken as aforesaid, and the further sum of [sixpence], being the value of the said pigeon, and also to pay the sum of _____ shillings* (b) for costs; and in default of immediate payment of the said sums, to be imprisoned in the _____ [and there kept to hard labour] for the space of _____ (e) calendar months, unless the said sums be sooner paid; and I direct that the said sum of [two] pounds shall be paid to A. J., of _____ aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, and that the said sum of [sixpence] shall be paid to the said A. B. [or, if he have been examined in proof of the offence, then thus: "also to the said A. J., A. B. the owner of the said pigeon, having been examined in proof of the offence aforesaid;"] and I order that the said sum of _____ shillings for costs shall be paid to _____ [the complainant]. Given under my hand and seal the day and year first above mentioned.

J. P. (L. s.)

(a) Give the warren or ground some description. (See ante, p. 775.)

(b) If time be given for payment of the penalty, &c., the form of the conviction may be the same as the above, to the *, and then thus [for costs; and I order that the said sums shall be paid by the said C. D. on or before the — day of — next; and

in default of payment on that day to be imprisoned, &c.] Conclude as in the above form to the end.

(c) See to whom the penalty is to be paid, ante, p. 788.

(d) See the enactment, ante, p. 806.

(e) See the 24 & 25 Vict. c. 96, s. 23, ante, p. 806.

Gaming and Lotteries.

AS to the duties on cards, see "*Cards*."

As to horse-races, see *post*, "*Horses and Horse-racing*."

Herein of,

I. Gaming in General, p. 837.

18 Geo. 2, c. 34; 5 Geo. 4, c. 83; 5 & 6 Will. 4, c. 41; 8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. c. 38; 31 & 32 Vict. c. 52.

II. Keeping or Haunting Gaming Houses, p. 851.

33 Hen. 8, c. 9; 31 Eliz. c. 5; 2 Geo. 2, c. 28; 18 Geo. 2, c. 34; 25 Geo. 2, c. 36; 58 Geo. 3, c. 70; 3 Geo. 4, c. 114.

III. Lotteries and Little Goes, and Foreign Lotteries, p. 853.

10 & 11 Will. 3, c. 17; 9 Ann. c. 6; 10 Ann. c. 26; 8 Geo. 1, c. 2; 9 Geo. 1, c. 19; 6 Geo. 2, c. 35; 12 Geo. 2, c. 28; 13 Geo. 2, c. 19; 42 Geo. 3, c. 119; 6 & 7 Will. 4, c. 66; 8 & 9 Vict. c. 74.

IV. Forms, p. 861.

I. Gaming in General.

Mr. Dalton says, that playing at cards and dice, and the like, are not prohibited by the common law; neither are they *mala in se* of their own nature, but only prohibited by statute. (*Dalt. c. 46.*) But there must be no cheating; (see *Da Costa v. Jones, Cowp. 729; Sherborn v. Colebach, 2 Vent. 175;*) and the playing must, it seems, be innocently and moderately. (*Bac. Ab. Gaming, (A).* And see *per Abbott, C. J., in R. v. Rosier, 1 B. & C. 272.*)

Gambling not an offence at common law; unless by fraud, or excessive.

Keeping a common gaming-house is a misdemeanor. (*R. v. Rosier, 1 B. & C. 272.*)

Keeping a gaming-house.

Cock-fighting is illegal and indictable at common law. (*Bac. Ab. Gaming, (A); 3 Keb. 463, 510.*) And by 5 & 6 Will. 4, c. 59, s. 3, keeping or using a room, &c. for cocking, is illegal, and a penalty of 5*l.*, nor less than 10*l.*, for each day, may be inflicted. (See "*Cattle and Animals, Treatment of*." There are also provisions against this offence in the Metropolitan Police Acts.)

Cock-fighting.

There are many statutes for the restraining of gaming. The first statute which prohibited any sort of games and diversions was the 12 Ric. 2, c. 6, repealed by 7 Jac. 1. c. 28. It applied only to servants, labourers, and artificers. The games prohibited were tennis, or foot-ball, quoits, dice, casting of stone kails, and other such *importune games*. (*Bac. Ab. Gaming, (B.).*) Also by the 33 Hen. 8, c. 9, the principal enactments of which are directed against the keeping or haunting of gaming-houses, artificers, apprentices, and servants are prohibited, under penalties against gaming. (See the enactments, *post*, p. 852.)

Statutes against gaming.

The principal statutes now in force, restraining gaming, are the 18 Geo. 2, c. 34; 8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. c. 38; 31 & 32 Vict. c. 52, which we shall now notice. The statutes for putting down gaming-houses will be found in the next section of this title, p. 851.

Artificers and servants prohibited gaming.

In the last edition of this work many authorities were cited as to the interpretation of the statutes of Car. 2 and Anne, but as those statutes are now repealed, it has not been thought necessary to reprint them.

The 12 Geo. 2, c. 28, s. 2, and 13 Geo. 2, c. 19, s. 9, contain provi-

1. *Gaming in general.*

12 Geo. 2, c. 28,
and 13 Geo. 2,
c. 19.

Certain games de-
clared of them-
selves illegal.

12 Geo. 2, c. 34.

No person shall
keep a place for
playing roly-poly,
or other game
with cards or
dice; under pe-
nalties of 12 Geo. 2,
c. 28.

Persons playing
shall incur the
penalties of that
act.

On information
for any offence
against this act.

Persons may be
summoned to
give evidence,
who, on neglect
or refusal to ap-
pear, or giving
false evidence,
shall forfeit 50l. or
be committed for
six months.

sions declaring certain games, viz. the games of the ace of hearts, pharaoh, basset, and hazard, and the game of passage, and other games therein to be illegal, and impose penalties for gaming, &c. at them; but as the principal provisions of these enactments are directed against lotteries, they will be found fully noticed under the 3rd sect. of this title relating to lotteries, *post*, p. 853.

By the 18 Geo. 2, c. 34, intituled "An act to explain, amend, and make more effectual the laws in being, to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse races," sect. 1, after reciting that notwithstanding the many good and wholesome laws now in being, for preventing excessive and deceitful gaming, many persons of ill fame and reputation who have no visible means of subsistence, do keep houses, rooms, and other places for playing, and do permit persons therein to play at cards, dice, and other devices for large sums of money, by means whereof divers young and unwary persons and others are drawn in to lose the greatest part and sometimes all their substance; and it frequently happens they are thereby reduced to the utmost necessities and betake themselves to the most wicked courses, which end in their utter ruin: and whereas a certain pernicious game called roulette or roly-poly is daily practised, and the laws now in being have by experience been found ineffectual to put a stop to such pernicious practices: for remedy whereof it is enacted, that no person or persons of what condition soever shall keep any house, room or place for playing, or permit or suffer any person or persons whatsoever within any such house, room or place to play at the said game of roulette, otherwise roly-poly, or at any other game with cards or dice already prohibited by the laws of this realm; and in case any person or persons whatsoever shall keep any such house, room or place for playing, or permit or suffer any person or persons as aforesaid to play at the said game of roulette, otherwise roly-poly, or at any other game with cards or dice already prohibited by law, such person or persons so offending shall incur the pains and penalties and be liable to such prosecution as is directed in and by an act made in the 12th year of his present Majesty, intituled "An act for the more effectual preventing excessive and deceitful gaming."

Sect. 2. If any person or persons whatsoever shall, after the said 24th of June, 1745, play at the said game of roulette, otherwise roly-poly, or at any game or games with cards or dice, already prohibited by law, every such person or persons so offending shall also incur the pains and penalties, and be liable to such prosecution as is directed in and by an act made in the 12th year of his present Majesty, intituled "An act for the more effectual preventing excessive and deceitful gaming." (*Post*, p. 855.)

In the construction of the 2nd sect. of this act and of the 12 Geo. 2, c. 28, s. 3, it has been held that the game of hazard is an unlawful game within them, whether played in private or at a public gaming-table. (*M'Kinnell v. Robinson*, 3 M. & W. 434.)

By s. 4, for the more easy conviction of persons offending against this or any other former act for preventing excessive and deceitful gaming, it is enacted, that it shall and may be lawful to and for such person or persons who have jurisdiction to hear and determine informations upon the statutes against excessive and deceitful gaming upon any information exhibited before them for any offence committed against this act or against the 12 Geo. 2, c. 28, *post*, p. 855, or against the 13 Geo. 2, c. 19, *post*, p. 857, to summon any person or persons other than the party accused to appear before them at a certain day, time and place to be inserted in such summons, and to give evidence for the discovery of the truth of the matter in the said information contained; and in case of neglect or refusal to appear, or if upon appearance such person or persons shall refuse to give evidence or shall give any false evidence, every such person or persons so offend-

ing shall forfeit and lose the sum of 50*l.*: to be levied by distress and sale of the offender's goods and chattels by warrant under the hands and seals of such person issuing such summons as aforesaid; and in case such person or persons not appearing or neglecting or refusing to give such evidence, or giving any false evidence, shall not have sufficient goods and chattels whereon to levy the said sum of 50*l.*, every such person or persons shall be by such person or persons having jurisdiction as aforesaid committed to the common gaol for the county, city, or place where such offence shall be committed, there to remain for the space of 6 months without bail or mainprize.

Sect. 5. No person or persons other than the parties, plaintiff and defendant in the cause, shall be incapacitated from being a witness touching any offence committed against the laws for preventing excessive and deceitful gaming by reason of having played, betted, or staked at any game prohibited by this or any of the said statutes.

Sect. 6. Nothing in this act contained shall extend to prevent or hinder any person or persons from playing at any game whatsoever, within any of his Majesty's royal palaces wherein his Majesty, his heirs and successors, shall then actually reside.

Sect. 7. No privilege of Parliament shall be allowed to any person or persons whatsoever against whom any prosecution or proceeding shall be commenced or had, for keeping of any public or common gaming house, or any house, room, or place for playing at any game or games prohibited by this, or any other act now in being, against excessive or deceitful gaming; any law, usage or custom to the contrary in any wise notwithstanding.

Sect. 9. If any person so offending shall discover any other person so offending, so that such person be thereupon convicted, the person so discovering shall be discharged and indemnified from all penalties, by reason of any such offence; if such person so discovering hath not been before convicted thereof, and shall be admitted as an evidence to prove the same.

Sect. 11 relates to horse-racing. See it, *post*, tit. "*Horses*."

With respect to what is a losing "at one sitting," see *Bones v. Booth*, 2 *Bla. Rep.* 1226; *Hodson v. Terrill*, 1 *C. & M.* 801.

With respect to the indictment, it is said that as the penalty is given to the poor of a parish, the offence should be stated to have been committed within that parish. (*Starke, Crim. Law.* 502; *R. v. Luckup*, 2 *Stra.* 1048.) It is not necessary to prove the precise sum as laid in the indictment, if laid under a *videlicet*: *contra*, if the indictment averred that the defendant had won any bills of exchange of a specified amount. (*R. v. Hill*, 1 *Starke*, 359, and see *R. v. Gillham*, 6 *T. R.* 265.)

Under this act no action need be brought for the penalty. (*R. v. Luckup*, 2 *Stra.* 1048.)

By the 5 Geo. 4, c. 83, s. 4, every person playing or betting in any open or public place, at or with any table or instrument of gaming, at any game or pretended game of chance, may be treated as a vagrant within the act.

By the 31 & 32 Vict. c. 52, s. 3, which is to be read with the 5 Geo. 4, c. 83, every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the recited act, and as such may be convicted and punished under the provisions of that act.

As to gaming in prisons, see tit. "*Gaols*," *post*, p. 862.

As to gaming in public houses, see "*Alcouse*."

1. *Gaming in general.*

18 Geo. 2, c. 34.

No person incapable of being a witness except the parties for having played, betted, &c.

Proviso for palaces.

No privilege of Parliament, &c.

Offenders discovering others shall be discharged.

What a losing at one sitting.

Form of indictment.

Vagrants.

31 & 32 Vict. c. 52. Extending provisions to gaming with coin, &c.

In prisons.

In public houses.

1. *Gaming in general.*

8 & 9 Vict. c. 109.

What shall be sufficient evidence that a house is a common gaming house.

Power of justices may be exercised under warrant.

Penalties on gaming house keepers, &c.

The 8 & 9 Vict. c. 109, repeals 33 Hen. 8, c. 9, ss. 16 and 23, and enacts by s. 2, that whereas doubts have arisen whether certain houses alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming houses; be it declared and enacted, that in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet; and every such house or place shall be deemed a common gaming house, such as is contrary to law and forbidden to be kept by the said act of king Henry VIII., and by all other acts containing any provision against unlawful games or gaming houses.

Sect. 3. That in every case (except within the metropolitan police district) in which the justices of the peace in every shire, and mayors, sheriffs, bailiffs and other head officers within every city, town and borough within this realm, now have by law authority to enter into any house, room or place, where unlawful games shall be suspected to be holden, it shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, room or place to be kept or used as a common gaming house, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any constable to enter with such assistance as may be found necessary, into such house, room or place, in like manner as might have been done by such justices, mayors, sheriffs, bailiffs or other head officers, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search and bring before a justice of peace all such persons found therein as might have been arrested therein by such justice of peace had he been personally present; and all such persons shall be dealt with according to law, as if they had been arrested in such house, room or place by the justice before whom they shall be so brought; and any such warrant may be in the form given in the first schedule annexed to this act.

Sect. 4. That the owner or keeper of any common gaming house, and every person having the care or management thereof, and also every banker, croupier and other person who shall act in any manner in conducting the business of any common gaming house, shall, on conviction thereof, by his own confession, or by the oath of one or more credible witnesses, before any two justices of the peace, besides any penalty or punishment to which he may be liable under the provisions of the said act (33 Hen. 8), be liable to forfeit and pay such penalty, not more than 100*l.*, as shall be adjudged by the justices before whom he shall be convicted, or, in the discretion of the justices before whom he shall be convicted, may be committed to the house of correction, with or without hard labour, for any time not more than 6 calendar months; and on nonpayment of any penalty so adjudged, and of the reasonable costs and charges attending the conviction, the same shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of one of the convicting justices: provided always, that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper or other person having the care or management of a common gaming house; but no person who shall have been summarily convicted of any such offence shall be liable to be proceeded against by indictment for the same offence.

Sect. 5. That it shall not be necessary, in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using, or being concerned in the management or conduct of a common gaming house, to prove that any person found playing at any game was playing for any money, wager, or stake.

Sect. 6. That if any superintendent belonging to the metropolitan police force shall report in writing to the commissioners of police of the metropolis that there are good grounds for believing, and that he does believe, that any house, room or place within the metropolitan police district is kept or used as a common gaming house, it shall be lawful for either of the said commissioners, by order in writing, to authorise the superintendent to enter any such house, room or place, with such constables as shall be directed by the commissioner to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize all tables and instruments of gaming found in such house or premises, and also to seize all monies and securities for money found therein.

Sect. 7. That it shall be lawful for the police superintendent making such entry as aforesaid in obedience to any such order of one of the commissioners of police of the metropolis, with the assistance of any constable or constables accompanying him, to search all parts of the house, room or place which he shall have so entered where he shall suspect that tables or instruments of gaming are concealed, and all persons whom he shall find therein, and to seize all tables and instruments of gaming which he shall so find.

Sect. 8. That where any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game shall be found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under the provisions of this act, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein, although no play was actually going on in the presence of the superintendent or constable entering the same under a warrant or order issued under the provisions of this act (a), or in the presence of those persons by whom he shall be accompanied as aforesaid; and it shall be lawful for the police magistrate or justices before whom any person shall be taken by virtue of the warrant or order to direct all such tables and instruments of gaming to be forthwith destroyed.

Sect. 9. And for the more effectual prosecution of the keepers of common gaming houses, be it enacted, that every person who shall have been concerned in any unlawful gaming, and who shall be examined as a witness, by or before any police magistrate or justice of the peace, or on the trial of any indictment or information, against the owner or keeper or other person having the care or management of any common gaming house, touching such unlawful gaming, and who upon such examination shall make true and faithful discovery to the best of his or her knowledge of all things as to which he or she shall be so examined, and shall thereupon receive from the magistrate or justice of the peace or judge of the court by or before whom he or she shall be so examined a certificate in writing to that effect, shall be freed from all criminal prosecutions, and from all forfeitures, punishments and disabilities to which he or she may have become liable

1. *Gaming in general.*

8 & 9 Vict. c. 109.

Proof of gaming for money, &c. not necessary in support of informations for gaming.

Commissioners of police may authorise superintendent and constables to enter gaming houses, and seize all instruments of gaming, and take into custody all persons found therein.

Police superintendent may search for instruments of gaming.

What shall be deemed evidence of gaming.

Indemnity of witnesses.

(a) For form of warrant, see p. 843.

1. *Gaming in general.*

8 & 9 Vict. c. 109.

Cheats at play.

Wagers not recoverable at law.

Appeal to quarter sessions.

for any thing done before that time in respect of such unlawful gaming (a).

By sect. 17, cheating at cards is declared to be punishable as obtaining money under false pretences.

It is not necessary upon an indictment under this section to allege to whom the money belonged which actually was won. (*R. v. Moss*, 2 *Jur. N. S.* 1196.)

Sect. 18. That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise (b).

A foot race is a lawful game or pastime within this section. (*Batty v. Marriot*, 5 *C. B.* 818.)

When plaintiff and defendant agreed to ride a race, each on his own horse, both the horses ridden to become the property of the winner, it was held that the horses could not be regarded as a contribution toward a prize within the meaning of the provision 8 & 9 Vict. c. 109, s. 18, and that the contract was therefore void under that section, as being "by way of gaming or wagering." (*Coombes v. Dibble*, *Law Rept.* 1 *Ex.* 248.)

Sect. 20. That any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction, or within 48 hours thereafter, shall enter into a recognizance, with two sufficient securities, conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal; and that every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place, in like manner as in cases of misdemeanor, under the provisions of 7 Geo. 4, c. 64; and in case the appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

Sect. 21 enacts, in the usual way, that any distress under the act

(a) Sections 10—14 relate to places licensed for billiards, and will be found at length, *supra*. S. 16 provided for discontinuing pending actions, &c., upon the statutes, repealed by s. 15.

(b) This does not prevent a person from recovering his deposit from a stakeholder before the event has happened. (*Varney v. Hickman*, 5 *C. B.*

271.) A footrace is within this proviso (*Batty v. Marriot*, 5 *C. B.* 808); but sweeps on horse races are still illegal as lotteries. (*Allport v. Nutt*, 1 *C. B.* 989; *Gatty v. Field*, 9 *Q. B.* 431.) By betting on horse races or other matters no penalty is incurred. By s. 19, a form is substituted for that of a feigned issue.

shall not be unlawful for want of form; and, by sect. 22, plaintiff is not to recover after tender of amends.

Sect. 23. That no action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for any thing done or omitted to be done in pursuance of this act, or in the execution of the authorities under this act, unless notice in writing shall be given by the party intending to prosecute such suit, information, or other proceeding, to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within 3 calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within 3 calendar months next after the doing such damage shall have ceased.

Sect. 25. That no information, conviction, or other proceeding before or by any justice or justices under this act shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by *certiorari* into her Majesty's Court of Queen's Bench.

1. *Gaming in general.*

8 & 9 Vict. c. 109.
Limitation of actions.

Conviction, &c.
not to be quashed for informality, &c.

The FIRST SCHEDULE to which the foregoing Act refers.

Form of Warrant.

County of } To the constable

Whereas it appears to me, *J. P.*, one of the justices of our Lady the Queen, assigned to keep the peace in the said county, by the information on oath of *A. B.*, of in the county of , yeoman, that the house [room or place] known as [*here insert a description of the house, room, or place by which it may be readily known and found*], is kept and used as a common gaming house within the meaning of an Act passed in the year of the reign of her Majesty Queen Victoria, intituled [*here insert the title of this Act*].

This is, therefore, in the name of our Lady the Queen, to require you, with such assistants as you may find necessary, to enter into the said house [room or place], and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and there diligently to search for all instruments of unlawful gaming which may be therein, and to arrest, search, and bring before me, or some other of the justices of our Lady the Queen assigned to keep the peace within the county of as well the keepers of the same as also the persons there haunting, resorting, and playing, to be dealt with according to law; and for so doing this shall be your warrant.

J. P. (J.S.)

Given under my hand and seal at in the county of this
day of in the year of the reign of .

By the 16 & 17 Vict. c. 119, "An act for the Suppression of Betting Houses."

Sect. 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

No house, &c. to be kept for purpose of owner or occupier betting with other persons.

1. *Gaming in general.*

16 & 17 Vict. c. 119.

Betting houses to be gaming houses within 8 & 9 Vict. c. 109.

Penalty on owner or occupier of betting house.

A tree in Hyde Park to which the defendant habitually resorted for betting upon horse races was held in *Doggett v. Cattarn*, 13 W. R. 160, to be a place within this section, and therefore that the plaintiff might recover money deposited with the defendant on a bet.

Sect. 2. Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of 8 & 9 Vict. c. 109, to amend the laws concerning games and wagers.

Sect. 3. Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any 2 justices of the peace, be liable to forfeit and pay such penalty not exceeding 100*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding 6 calendar months.

An information under this section charged A. with having on the 5th of October, and on divers other days and times between October 5 and laying the information (16th November), being then and there the occupier of a house, knowingly and wilfully opened, kept, and used the same for the purpose of betting with persons resorting thereto. The justices of the peace stated that it was established to their satisfaction that he did so keep and use the house on the 8th November, but not on any other day, and they convicted him of the offence committed on the 8th. *Wightman, J.*, held that the information was good, as not alleging more than an offence, and that the conviction thereon might be upheld. (*Onley v. Gee*, 30 L. J. M. C. 222.)

On land adjoining a race course, and just outside the enclosure reserved for ticketholders, there was a long slip of ground 6 feet wide, bounded on one side by the railings of the enclosure, and on the other by a permanent wooden paling; within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on: at one of these structures the appellant conducted this business. The court decided that this structure was clearly an office and place opened, kept, and used for the purpose of carrying on the business, of which the appellant had the care and management, or which he assisted in conducting, and further that the appellant there did what the act declares to be illegal. (*Shaw v. Morley*, L. R. 3 Ex. 137.)

Penalty on persons receiving money on condition of paying money on event of any bet.

Sect. 4. Any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse race or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking,

promise, or agreement express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall, upon summary conviction thereof before 2 justices of the peace, forfeit and pay such penalty, not exceeding 50*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the non-payment of such penalty and costs, or in the first instance if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding 3 calendar months.

Sect. 5. Any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction.

Sect. 6. Provided always, that nothing in this act contained shall extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race, or lawful sport, game, or exercise, or to the owner of any horse engaged in any race.

Sect. 7. Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers, in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers, in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers, in manner aforesaid, shall, upon summary conviction thereof before 2 justices of the peace, forfeit and pay a sum not exceeding 30*l.*, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding 2 calendar months.

Sect. 8. If any person convicted under this act on information before justices shall be adjudged to pay any penalty, or any costs and charges attending the conviction, and shall fail to pay such penalty or costs, the same may be levied by distress and sale of the goods and chattels of the offender by warrant under the hand and seal of one of the convicting justices: provided always, that if any person shall be committed to prison for default of payment of any penalty and costs, then the costs alone may be levied by distress as aforesaid.

Sect. 9. One half of every pecuniary penalty which shall be adjudged to be paid under this act shall be paid to the informer, and the remaining half shall be applied in aid of the poor rate of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorised to receive poor rates in such parish, or if the place wherein the offence shall have been committed shall be extra-parochial, then the justices by whom

1. *Gaming in general.*

16 & 17 Vict. c. 119.

Money so received may be recovered from the persons receiving the same.

This act not to extend to stakes due to owner of horse winning a race.

Penalty on persons exhibiting placards or advertising betting houses.

Penalties and costs may be levied by distress

Application of penalties.

1. *Gaming in general.*

16 & 17 Vict. c. 119.

On neglect to prosecute any summons, justices may authorise some other person to proceed.

Justices may authorise search of suspected houses.

Commissioner of police may authorise superintendent of police to enter and search suspected houses.

Appeal to quarter sessions.

such penalty shall be adjudged to be paid shall direct such remaining half thereof to be applied in aid of the poor rate of such extra-parochial place, or, if there shall not be any poor rate therein, in aid of the poor rate of any adjoining parish or district.

Sect. 10. In case any person who shall have laid any complaint or information in respect of any offence against this act shall not appear at the time at which the defendant may have been summoned to appear, or at any time to which the hearing of the summons may have been adjourned, or, in the opinion of any justices having authority to adjudicate with respect to the offence charged in such information or complaint as aforesaid, shall otherwise have neglected to proceed upon or prosecute such information or complaint with due diligence, it shall be lawful for such justices to authorise any other person to proceed on such summons instead of the person to whom the same may have been granted, or if such justices think fit, to dismiss the summons already granted, and authorise any person to take out a fresh summons in respect of the offence charged in such information or complaint, in like manner as if the previous summons had not been granted.

Sect. 11. It shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, office, room, or place to be kept or used as a betting house or office, contrary to this act, to give authority by special warrant under his hand, when in his discretion he shall think fit, to any constable or police officer, to enter, with such assistance as may be found necessary, into such house, office, room, or place, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises; and any such warrant may be according to the form given in the first schedule annexed to the before-mentioned act "to amend the law concerning games and wagers" (a).

Sect. 12. If any superintendent belonging to the metropolitan police force shall report in writing to the commissioners of police of the metropolis that there are good grounds for believing and that he does believe that any house, office, room, or place within the metropolitan police district is kept or used as a betting house or office, contrary to this act, it shall be lawful for either of the said commissioners by order in writing to authorise the superintendent to enter any such house, office, room, or place, with such constables as shall be directed by the commissioner to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises.

Sect. 13. Any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction give notice of his intention to appeal, and shall at the time of such conviction, or within 48 hours thereafter, enter into a recognizance with 2 sufficient securities conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over any party who shall have made information against the

(a) 8 & 9 Vict. c. 109, *ante*, p. 840.

party convicted, and any witnesses who shall have been examined, in sufficient recognizances to attend and be examined at the hearing of such appeal; and every such witness, on producing a certificate of being so bound under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place in like manner as in cases of misdemeanor under the provisions of the 7 & 8 Geo. 4, c. 28; and in case any such appeal shall be dismissed and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellants.

1. *Gaming in general.*

16 & 17 Vict. c. 119.

7 & 8 Geo. 4, c. 28.

Sect. 14. On any such appeal no objection shall be allowed to the information whereon the conviction has taken place, or to such conviction, on any matter of form or on any insufficiency of statement, provided it shall appear to the justices in quarter sessions that the defendant has been sufficiently informed of the charge intended to be made against him, and that such conviction was proper on the merits of the case; and no information, conviction, or judgment of the justices in general or quarter sessions shall be removed by *certiorari* into the Court of Queen's Bench.

No objection in matter of form and *certiorari* taken away.

Sect. 15. When any distress shall be made for any money to be levied by virtue of the warrant of any justice under this act, the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action on the case in any of her Majesty's courts of record.

Distress not unlawful for want of form.

Sect. 16. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding before such action brought, and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

Tender of 'amends,' &c.

Sect. 17. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this act, or in the execution of the authorities under this act, unless notice in writing shall be given by the party intending to prosecute such suit, information, or other proceeding to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within 3 calendar months next after the act or omission complained of, or in case there shall be a continuation of damage then within 3 calendar months next after the doing such damage shall have ceased.

Limitation of actions.

The 17 & 18 Vict. c. 38, "An Act for the Suppression of Gaming Houses."

17 & 18 Vict. c. 38.

After reciting the 8 & 9 Vict. c. 109, enacts:

Sect. 1. Any person who shall wilfully prevent any constable or officer authorised under the provisions of the said 8 & 9 Vict. to enter

Penalty on persons obstructing the entry of con-

1. *Gaming in general.*

17 & 18 Vict. c. 38.
 Stables authorised to enter any house suspected to be a common gaming house.

any house, room, or place, from entering the same or any part thereof, or who shall obstruct or delay any such constable or officer in so entering, and any person who, by any bolt, bar, chain, or other contrivance, shall secure any external or internal door of or means of access to any house, room, or place so authorised to be entered, or shall use any means of contrivance whatsoever for the purpose of preventing, obstructing, or delaying the entry of any constable or officer authorised as aforesaid into any such house, room, or place, or any part thereof, may for every such offence, on a summary conviction of the same before 2 justices of the peace, be adjudged by such justices to forfeit and pay any penalty not exceeding 100*l.* together with such costs attending the said conviction as to the said justices shall appear reasonable; and on the non-payment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any period not exceeding 6 calendar months.

Obstructing entry of constables to be evidence of house being a common gaming house.

Sect. 2. Where any constable or officer authorised as aforesaid to enter any house, room, or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door of or means of access to any such house, room or place so authorised to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorised as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming house within the meaning of this act and of the former acts relating to gaming (*a*), and that the persons found therein were unlawfully playing therein.

Penalty on persons apprehended for giving false names or addresses.

Sect. 3. If any person found in any house, room, or place entered by any constable or officer authorised as aforesaid to enter the same, upon being arrested by any such constable or officer, or upon being brought before any justices, on being required by such constable or officer or by such justices to give his name and address, shall refuse or neglect to give the same, or shall give any false name or address, he may, upon summary conviction thereof before the same or any other justices, be adjudged to pay any penalty not exceeding 50*l.* together with such costs as to such justices shall appear reasonable, and on the nonpayment of such penalty and costs, or in the first instance, if to such justices it shall seem fit, may be imprisoned in the common gaol or house of correction for any period not exceeding one month.

Penalties on persons keeping gaming houses.

Sect. 4. Any person, being the owner or occupier, or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof be-

(*a*) The former acts relating to gaming are found under this title.

fore any 2 justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding 500*l.* as to such justices shall seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding 12 calendar months.

Sect. 5. It shall be lawful for the justices before whom any persons shall be brought who have been found in any house, room, or place entered in pursuance of any authority granted under the provisions of the said 8 & 9 Vict. c. 109, to require any of such persons to be examined on oath and give evidence touching any unlawful gaming in such house, room, or place, or touching any act done for the purpose of preventing, obstructing, or delaying the entry into such house, room, or place or any part thereof of any constable or officer authorised as aforesaid; and no person so required to be examined as a witness shall be excused from being so examined when brought before such justices as aforesaid, or from being so examined at any subsequent time, by or before the same or any other justices, or by or before any court, on any proceeding, or the trial of any indictment, information, action, or suit in anywise relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question as aforesaid, shall be subject to be dealt with in all respects as any person appearing as a witness before any justices or court in obedience to a summons or subpoena, and refusing, without lawful cause or excuse, to be sworn or to give evidence, may by law be dealt with.

Sect. 6. Every person so required to be examined as a witness as aforesaid, who upon such examination shall make true and faithful discovery to the best of his knowledge of all things as to which he is so examined, shall receive from the justices or judge of the court by whom he is examined a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures, and punishments to which he may have become liable for anything done before that time in respect of the matters touching which he has been so examined; but such witness shall not be indemnified under this act unless he receive from such justices or judge a certificate in writing under their hands, stating that such witness has on his examination made a true disclosure touching all things as to which he has been examined; and if any action, information, or indictment be at any time pending in any court against any person so examined in respect of any act of gaming touching which he was so examined, and if any action, information, or indictment be at any time pending in any court against any person so examined as a witness in manner before mentioned, for any such matter or thing, such court shall, on the production and proof of such certificate, stay the proceedings in any such action, information, or indictment, and may, in its discretion, award to such person such costs as he may have been put to by such action, information, or indictment.

Sect. 7. If any person convicted under this act on information before justices shall be adjudged to pay any penalty or any costs and charges attending the conviction, and shall fail to pay such penalty or costs, the same may be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of one of the convicting justices: Provided always, that if any person shall be committed to prison for default of payment of any penalty

1. *Gaming in general.*

17 & 18 Vict. c. 33.

Justices may require any of the persons apprehended to be sworn and give evidence.

Penalty on refusing to be sworn.

Persons required to be examined as witnesses, and making a full discovery, to be freed from all penalties, &c.

Penalties and costs may be levied by distress.

1. *Gaming in general.*

17 & 18 Vict. c. 38
Applications of
penalties (a).

On neglect to pro-
secute any sum-
mons, justices
may authorise
some other per-
son to proceed.

Appeal to quarter
sessions.

No objection
allowed to infor-
mation whereon

and costs, then the costs alone may be levied by distress or afore-
said.

Sect. 8. One half of any pecuniary penalty which shall be adjudged to be paid under this act shall be paid to the person laying the information upon which the conviction takes place, and the remaining half shall be applied in aid of the poor rate of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorised to receive poor rates in such parish, or if the place wherein the offence shall have been committed shall be extra-parochial, then the justices by whom such penalty shall be adjudged to be paid shall direct such remaining half thereof to be applied in aid of the poor rate of such extra-parochial place, or if there shall not be any poor rate therein, in aid of the poor rate of any adjoining parish or district.

Sect. 9. In case any person who shall have laid any information in respect of any offence against this act shall not appear at the time at which the defendant shall have been summoned to appear, or at any time to which the hearing of the summons may have been adjourned, or, if such person, in the opinion of any justices having authority to adjudicate with respect to the offence charged in such information as aforesaid, shall otherwise have neglected to proceed upon or prosecute such information with due diligence, it shall be lawful for such justices to authorise any other person to proceed on such information and summons instead of the person to whom the same may have been granted, or such justices may dismiss the first information and summons, and authorise any person to lay a fresh information in respect to the offence charged in such first information, in like manner as if the previous summons had not been granted.

Sect. 10. Any person who shall be summarily convicted under this act may appeal to the next general or quarter session of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person, at the time of such conviction, or within 48 hours thereafter, enter into a recognizance, with 2 sufficient securities, conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the court at such session, and to pay such costs as shall be by the last-mentioned court awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made to bind over any party who shall have made information against the party convicted, and any witnesses who shall have been examined, in sufficient recognizances, to attend and be examined at the hearing of such appeal; and every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place, in like manner as in cases of misdemeanor, under the provisions of the 7 & 8 Geo. 4, c. 28, intituled "An Act for Improving the Administration of Criminal Justice in England," and in case any such appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

Sect. 11. On any such appeal, no objection shall be allowed to the information whereon the conviction has taken place, or to such con-

(a) Where a conviction under this act takes place at a Metropolitan police court and the penalty adjudged to be paid was paid, the receiver of the metropolitan police

district was held, pursuant to 2 & 3 Vict. c. 71, s. 47, entitled to claim half the penalty. (*Wray v. Ellis*, 28 L. J. M. C. 45.)

viction, on any matter of form or on any insufficiency of statement, provided it shall appear to the justices in quarter sessions that the defendant has been sufficiently informed of the charge intended to be made against him, and that such conviction was proper on the merits of the case; and no information, conviction, or judgment of the justices in general or quarter sessions shall be removed by certiorari into the court of Queen's Bench.

Sect. 12. When any distress shall be made for any money to be levied by virtue of the warrant of any justice under this act, the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning, on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action on the case in any of her Majesty's courts of record.

Sects. 13 and 14. As to tender of amends and limitation of actions are the same as ss. 16 and 17 of 16 & 17 Vict. c. 119.

2. *Keeping or haunting gaming houses.*

conviction has taken place, &c. in matter of form.

Judgment not removable by certiorari.

Distress not unlawful for want of form.

II. Keeping or Haunting Gaming Houses.

A common *gaming-house* is a nuisance at common law, being detrimental to the public, as it promotes cheating and other corrupt practices, and incites to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. (1 *Hawk.* c. 25, s. 6; *Rex v. Dixon*, 10 *Mod.* 336; *Rex v. Mason, Leach*, C. C. 487.)

Keeping one an offence at common law.

The keeper of it is indictable and punishable as for a misdemeanor, with fine or imprisonment, or both (*Id.*); and by the 3 Geo. 4, c. 114, hard labour may be added to the imprisonment.

Punishment for.

In *Rex v. Rogier and another*, (1 B. & C. 272,) the "keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called *rouge et noir*, and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money," was held an offence indictable at common law. *Et per Abbott*, C. J., *S.C.*—"I have no doubt that the facts stated in this indictment constitute an offence at common law. *Hawkins*, in the passage which has been cited, (*viz.* 1 *Hawk.* c. 25, s. 6,) observes, 'It has been said that common gaming houses are nuisances in the eye of the law:' and then he assigns the reason, *viz.* that they tend to produce certain evil consequences, which is not very different from saying that they are nuisances if those consequences are produced. Since his time many parties have been convicted upon indictments, in which the keeping of such a house has been charged to be an offence at common law. If any confirmation of the authority of *Hawkins* were wanting, it is to be found in the enactments of the legislature. The 25 Geo. 2, c. 36, s. 5 (a), after reciting that, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, enacts, 'that if any 2 inhabitants of any parish give notice in writing to a constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, the constable shall go with such inhabitants to a justice of the

25 Geo. 2, c. 36, s. 5, declares the common law.

(a) See *ante*, "*Disorderly Houses.*"

2. *Keeping or haunting gaming houses.*

25 Geo. 2, c. 36.

peace, and shall, upon such inhabitants making oath that they believe the contents of the notice to be true, enter into a recognizance to prosecute such offence, and the constable is to be allowed the expenses of the prosecution, and each of the inhabitants is to receive 10*l*.' And section 8 recites, 'that by reason of many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment;' and then enacts, 'that any person who shall appear, act, or behave himself as master, or as the person having the care or management of any such house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such, although he be not the real owner.' These provisions are a legislative declaration that the keeping of a gaming-house is an indictable offence. Besides, the 9 Anne, c. 14, s. 2, makes playing at any game unlawful, if more than 10*l*. shall be lost. Now in this case the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful; and if so, there can be no doubt that this is an offence at common law." *Holroyd, J.*, in the same case, added, that, in his opinion, the indictment would have been sufficient merely to have alleged, that the defendants kept a common gaming-house. (And see *Rex v. Taylor*, 3 B. & C. 502.)

Gaming-houses prohibited by 33 Hen. 8, c. 9.

By stat. 33 Hen. 8, c. 9, s. 11, it was enacted that no person shall for his gain, lucre, or living, keep any common house, alley, or place of bowling, coyting, colysh, cayls, half-bowl, tennis, dicing-table, carding, or any unlawful game then or thereafter to be invented, on pain of forfeiting 40*s*. a-day.

The act also contained certain provisions for enforcing the penalties and as to other matters, sections 16 and 23 were repealed as to games of skill by 8 & 9 Vict. c. 109, and the whole act may now be considered obsolete but the 26 & 27 Vict. c. 125 (the statute law revision act of 1863) only expressly repeals ss. 16 and 17.

Playing in inns.

But it was resolved upon this section, in the third year of Jac. I., that if the guests in an inn or tavern call for a pair of dice or tables, if the house be not kept for gaming, lucre, or gain, but they play only for recreation, and for no gain to the owner of the house, this is not within the statute, nor is such person that plays in such house that is not kept for lucre or gain within the penalty of that law. (*Dalt. c. 46.*)

Cock-pits.

Keeping a cock-pit is within the act, and is also indictable at common law. (1 *Russ.* 300.)

Haunting gaming-houses.

And moreover, by the same statute, s. 12, it is further enacted, that every person using and haunting any of the said houses and plays, and there playing, shall forfeit 6*s*. 8*d*.

Power of justices as to keepers of such houses, and those found there.

Sect. 14. And all justices of the peace in every shire, mayor, sheriffs, bailiffs, and other head officers in every city, town and borough, may enter all such houses, places, and alleys, where such games shall be suspected to be holden, exercised, used, or occupied, and as well the keepers of the same, as also the persons there haunting, resorting, and playing, may take, arrest, and imprison, and keep in prison until the keepers and maintainers of the same plays and games have found sureties to the king's use, to be bound by recognizance or otherwise, no longer to use, keep or occupy any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves, or with sureties, no more to play, haunt, or exercise from thenceforth, in, at, or to any of the said places, or at any of the said games.

And of officers in cities and towns.

Sect. 15. And the mayors, sheriffs, bailiffs, constables, and other head officers, within every city, borough or town, shall make due

search weekly, or at the furthest once a month, in all places where any such houses, alleys, plays, or places shall be suspected to be had, kept, and maintained; and if they shall not make such search at the furthest once a month, if the case so require, every such person offending shall forfeit 40s. for each month.

Sect. 16 (a). And all justices of the peace, mayors, bailiffs, sheriffs, and other head officers, and every of them, *finding or knowing* any person using unlawful games, contrary to this act, may commit every such offender to ward, there to remain without bail or mainprize till he be bound by obligation to the king's use, in such sum as by the discretion of the said justices, mayors, bailiffs, or other head officers shall be thought reasonable, that they shall not from henceforth use such unlawful games.

Sect. 22. But any master may license his servant to play at cards, dice, or tables, with himself, or with any other gentleman repairing to his said master openly in his house, or in his presence.

By stat. 2 Geo. 2, c. 28, s. 9, where it shall be *proved on the oath of 2 witnesses* before any justice of the peace, as well as where he shall find upon his own view, that any person hath used any unlawful game contrary to the said statute of Henry 8, the said justice shall have power to commit him to prison without bail, unless and until he shall enter one or more recognizance or recognizances, with sureties or without, at the discretion of the justice, that he shall not from thenceforth play at or use such unlawful game.

By the stat. 31 Eliz. c. 5, s. 7, all suits to be pursued upon any statute (that is, any statute then in force) for using any unlawful game shall be sued and prosecuted, or otherwise heard and determined, in the general quarter sessions or assizes of the county where the offence shall be committed, or in the leet within which it shall happen, and not in anywise out of the county.

By 18 Geo. 2, c. 34, s. 1, if any person shall keep any house, room, or place for playing, or permit any person within such house, &c., to play at the game of roulet, otherwise roly-poly, or at any other game with cards or dice, already prohibited by law, he shall incur the penalty of the 12 Geo. 2, c. 28, *ante*, namely, 200*l*. And, by sect. 2, all persons playing at any such game incur a similar penalty. (See the provisions, *ante*, p. 838.)

By sect. 7, *ante*, p. 839, no privilege of parliament shall be allowed to any person, against whom a prosecution shall be commenced, for keeping any public or common gaming-house, or any house, room, or place for playing at any before or now prohibited game.

The 25 Geo. 2, c. 36, the main provisions of which are directed against disorderly houses, contains provisions for the encouraging of prosecutions against persons keeping gaming-houses, and compels overseers of the poor and constables to prosecute them. (See the provisions, title "*Disorderly House*." See also *Clarke v. Rice*, 1 B. & Ald. 694; *R. v. Davies*, 5 T. R. 626; *R. v. Fox*, 5 Dowl. 242.)

As to gaming in public houses, see *ante*, "*Alehouses*."

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33 Hen. 8, c. 9.

Punishing offenders using unlawful games.

Masters may license servants.

Power of justices to commit.

How recovered.

Keeping or haunting gaming-houses.

Penalty, 200*l*.

No privilege of Parliament.

Overseers and constables may be compelled to prosecute gaming-house keepers.

Gaming in public houses.

III. Lotteries and Little Games.

By the 10 & 11 Will. 3, c. 17, intituled "*An Act for suppressing of Lotteries*;" reciting that "several evil-disposed persons, for divers years last past, have set up many mischievous and unlawful games, called lotteries, not only in the cities of London and Westminster, and in the suburbs thereof, and places adjoining, but in most of the eminent towns and places in England, and in the dominion of Wales, and

10 & 11 Will. 3, c. 17.

Lotteries declared nuisances.

(a) So much of this section as relates to games of skill was repealed by 8 & 9 Vict. c. 109.

3. *Lotteries and little goes.*

10 & 11 Will. 3, c. 17.

Persons keeping such lotteries.

Penalty 500*l*.

Offenders deemed rogues.

Persons playing, &c. to forfeit 20*l*.

9 Ann. c. 6.

Justices to prevent such lotteries.

Setting up or advertising such lotteries a penalty of 100*l*.

10 Ann. c. 26.

Insurances on marriages, &c., and keeping of offices for lotteries &c., prohibited.

Penalty, 500*l*.

Printers publishing same subject to penalty of 100*l*.

have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders, and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families, and to the reproach of the English laws and government, by colour of several patents or grants under the great seal of England for the said lotteries, or some of them; which said grants or patents are against the common good, trade, welfare, and peace of his Majesty's kingdoms:" for remedy whereof, it is enacted, "that all such lotteries, and all other lotteries, are common and public nuisances, and that all grants, patents, and licences for such lotteries, or any other lotteries, are void and against law."

Sect. 2. No person or persons whatsoever shall publicly or privately exercise, keep open, show, or expose to be played at, drawn at, or thrown at, or shall draw, play, or throw at any such lottery, or any other lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever; and that every person or persons so offending shall forfeit for every such offence the sum of 500*l*., to be recovered by information, bill, plaint, or action at law, in any of his Majesty's courts at Westminster; and the said parties so offending shall likewise be prosecuted as common rogues, according to the statutes in that case made and provided.

Sect. 3. Every person or persons that shall play, throw, or draw at any such lottery, play, or device, or other lotteries, shall forfeit for every such offence, the sum of 20*l*., to be recovered by information, bill, plaint, or action at law, in any of his Majesty's courts at Westminster.

By 9 Anne, c. 6, s. 56, all justices of the peace, and all mayors, bailiffs, head officers, constables, and other her Majesty's civil officers, within their respective jurisdictions, are hereby empowered and required to use their utmost endeavours to prevent the drawing of any such unlawful lottery, heretofore or hereafter to be set up, by all lawful ways and means; and that every person who shall set up, or shall, by writing or printing, publish the setting up any such unlawful lottery, with intent to have such lottery drawn, shall forfeit, for every such offence, 100*l*., to be recovered by information, bill, plaint, or action at law, in any of her Majesty's courts at Westminster.

By 10 Anne, c. 26, s. 109, every person or persons who shall erect, set up, or keep any office or place, for making insurances on marriages, births, christenings, or service, or on any of them, or any other office or place, under the denominations of sales of gloves, of fans, of cards, of numbers, of the Queen's picture, for the improvement of small sums of money, or the like offices or places, under the pretence of improving small sums of money, shall forfeit, for every such offence, the sum of 500*l*., to be recovered, with costs of suit, by action of debt, bill, plaint, or information, in any of her Majesty's courts aforesaid: and every printer or other person who shall, by writing or printing, publish the setting up or keeping any such office or place under any the denominations aforesaid, or like denominations, for the improvement of small sums of money, shall, for every such offence, forfeit the sum of 100*l*., to be recovered and distributed in such manner as the penalty last-mentioned is to be recovered and distributed; and every person or persons who, in any office or place, erected or set up for making insurances on marriages, births, christenings, or service, or under any other the denominations aforesaid, or any like denominations, for improvement of small sums, shall make, or suffer to be made therein, any new insurances or contracts for new insurances on marriages, births, christenings, or service, or receive any payments into any the said offices or places aforesaid, for improvement of small sums of money, shall forfeit, for every such offence, the sum of 100*l*., to be recovered and distributed in like manner.

By 8 Geo. 1, c. 2, s. 36, it is enacted, that all and every person or persons who shall erect, set up, continue or keep, or shall cause or procure to be erected, set up, continued or kept, any office or place under the denomination of sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, for the improvement of small sums of money; or shall sell or expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, by way of lottery, or by lots, tickets, numbers, or figures; or shall make, print, advertise, or publish, or cause to be made, printed, advertised, or published, proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by the chances of the prizes in some public lottery or lotteries, established or allowed by act of parliament: or shall deliver out, or cause or procure to be delivered out, tickets to the persons advancing such sums to entitle them to a share of the money so advanced according to such proposals or schemes; or shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme of the like kind or nature, under any denomination, name, or title whatsoever; and shall be thereof convicted upon the oath or oaths of one or more credible witness or witnesses, by 2 or more justices of the peace of the county, division, or liberty where such offence shall be committed, or the offender shall be found (which oath such justices of the peace are hereby empowered and required to administer), the person so convicted shall for every such offence, over and above any former penalties inflicted by any former act or acts of parliament made against any private or unlawful lotteries, forfeit the sum of 500*l.*, one third part thereof to his Majesty, his heirs and successors, one other third part thereof to the informer, and the remaining third part thereof to the poor of the parish where such offence shall be committed: the same to be levied by distress and sale of the offender's goods, by warrant under the hands and seals of such justices before whom such offender shall be convicted as aforesaid; and shall also for every such offence by such justices be committed to the county gaol, there to remain without bail or mainprize for the space of one whole year, and from thence till the said sum of 500*l.*, so forfeited as aforesaid, shall be fully paid and satisfied: Provided nevertheless, that any person who shall think himself or herself aggrieved by the judgment or determination of 2 or more such justices, in any of the cases aforesaid, shall have liberty to appeal to the next quarter sessions to be held for the county, city, or place where such judgment or determination shall be made or given, and that the judgment to be given by the justices at the said next quarter sessions shall be final.

Sect. 37. That all and every person and persons who, after the time aforesaid, shall be adventurer or adventurers in, or shall pay any money or other consideration, or any ways contribute unto, or upon the account of any such sales, lotteries, proposals or schemes aforesaid, shall forfeit for every such offence double the sum paid or contributed, to be recovered with costs of suit by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster.

By 12 Geo. 2, c. 28, intituled "An Act for the more effectual preventing of excessive and deceitful Gaming," after reciting 10 & 11 Will. 3, c. 17, 9 Ann. c. 6, and 8 Geo. 1, c. 2, ss. 36 and 37, it is enacted, that if any person or persons shall erect, set up, continue, or keep any office or place, under the denomination of a sale or sales of houses, land, advowsons, presentations to livings, plate, jewels, ships, goods, or other things, by way of lottery, or by lots, tickets, numbers or figures, cards or dice; or shall make, print, advertise, or publish, or cause to be made, printed, advertised, or published, proposals or schemes for advancing small sums of money by several persons,

3. *Lotteries and little goes.*

8 Geo. 1, c. 2.
Sales of lands or goods, and chances in public lotteries, prohibited.

Penalty, 500*l.*

Adventurers in same subject to a penalty of double the sum paid.

12 Geo. 2, c. 28.

Keeping an office, &c. for the sale of property by lottery, &c.;

or advertising, &c. lotteries of money;

3. *Lotteries and little goes.*

12 Geo. 2, c. 28.

or exposing to sale, lands, jewels, &c. by lottery, &c.,

shall be subject to a penalty, 200*l.*(b).

Application of penalties.

Certain games declared illegal, and within the acts.

Penalty of 50*l.* on the adventurers.

amounting in the whole to large sums, to be divided among them by chances of the prizes in some public lottery or lotteries established or allowed by act of parliament, or shall deliver out, or cause or procure to be delivered out, tickets to the persons advancing such sums, to entitle them to a share of the money so advanced, according to such proposals or schemes; or shall expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships, or other goods, by any game, method, or device whatsoever, depending upon, or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine, or device of chance of any kind whatsoever; such person or persons, and every or either of them, shall, upon being convicted (a) thereof before any one justice of the peace for any county, riding, or division, or before the mayor, or other justice or justices of the peace for any city, or town corporate, upon the oath or oaths of one or more credible witness or witnesses, (which said oaths the said justices of the peace and mayor are hereby authorised, empowered, and required to administer,) or upon the view of such justice or justices, or the mayor, justice, or justices for any city or town corporate, or on the confession of the party or parties accused, shall forfeit and lose the sum of 200*l.*, to be levied by distress and sale of the offender's goods, by warrant under the hands and seals of one or more justice or justices of the peace of such county, riding, division, city, or town where the offence shall be committed; which said forfeitures, when recovered, after deducting the reasonable charges of such prosecution, shall go and be applied, one third thereof to the informer, and the remaining two thirds to the use of the poor of the parish where such offence shall be committed, excepting the said two thirds of such forfeitures which shall be incurred by and recovered upon any person or persons within the city of Bath, which said two thirds shall go and be applied to and for the use and benefit of the poor residing within the hospital or infirmary lately erected for the benefit of poor persons resorting to the said city for the benefit of the mineral waters, after deducting the charges of conviction as aforesaid. And see 42 Geo. 3, c. 119, s. 5, *post*, p. 859.

By sect. 2, the said games of the ace of hearts, Pharaoh, basset, and hazard are and are hereby declared to be games or lotteries by cards or dice within the intent and meaning of the statutes 10 & 11 Will. 3, c. 17; 9 Ann. c. 6, s. 56; 10 Ann. c. 26, s. 109; 9 Geo. 1, c. 19. And that all and every person or persons who shall set up, maintain, or keep the said games of the ace of hearts, Pharaoh, basset, and hazard, shall be subject and liable to all and every the penalties and forfeitures in and by this act inflicted upon any person or persons who shall erect, set up, continue, or keep any of the said games or lotteries in this present act mentioned; and shall be prosecuted and convicted, and the penalties and forfeitures shall be sued for and recovered in like manner as the said penalties and forfeitures are by this act directed to be sued for and recovered.

The game of hazard is considered an unlawful game by 12 Geo. 2, c. 28, s. 3, and 18 Geo. 2, c. 34, s. 2, whether played in private or at a public gaming-table. (*M'Kinnell v. Robinson*, 3 *M. & W.* 434.)

By sect. 3, all and every person and persons who shall be adventurers in any of the said games, lottery or lotteries, sale or sales, or shall play, set at, stake, or punt at either of the said games of the ace of hearts, Pharaoh, basset, and hazard, and shall be thereof convicted in such manner and form as in and by this act is prescribed;

(a) The only proceeding now is by information, in the name of the attorney-general, &c., as pointed out by the 46 Geo. 3, c. 148.

(b) See the 42 Geo. 3, c. 119, s. 3, *post*, p. 858, making it a penalty of 500*l.*

every such person or persons shall forfeit and lose the sum of 50*l.*, to be sued for and recovered as aforesaid.

3. *Lotteries and little goes.*

And by 13 Geo. 2, c. 19, s. 9, reciting, that whereas a good and wholesome law was made in the 12th year of the reign of his Majesty King George 2nd, intituled, "An Act for the more effectual preventing of excessive and deceitful gaming;" it is enacted and declared, that the said game of passage, and all and every other game and games invented or to be invented with one or more die or dice, or with any other instrument, engine, or device in the nature of dice, having one or more figures or numbers thereon (backgammon and the other games now played with the backgammon tables only excepted), are and shall be deemed to be games or lotteries by dice, within the intent and meaning of the said in part recited act; and all and every person and persons who shall set up, maintain or keep any office, table, or place (save and except as in the said in part recited act is provided and declared) for the said game of passage, or for any other such game or games as aforesaid, (backgammon and the other games now played with the backgammon tables only excepted,) shall severally forfeit, be subject, and liable to all and every the penalties and forfeitures in and by the said in part recited act inflicted upon any person or persons who shall erect, set up, continue, or keep any of the games or lotteries in the said in part recited act mentioned; and all and every person or persons who shall play, set at, stake, or adventure at the said game of passage, or at any other such game as aforesaid, (backgammon and the other games now played with the backgammon tables only excepted,) save and except as in the said in part recited act is provided and declared, he and they respectively shall severally forfeit, be subject, and liable to all and every the penalties and forfeitures in and by the said in part recited act inflicted upon any person or persons who shall play, set at, stake, or adventure at any of the said games in the said in part recited act mentioned; and all and every such offenders respectively shall be prosecuted and convicted, and the several penalties and forfeitures shall be sued for, and recovered and disposed of in like manner, and to such uses, as the several penalties and forfeitures in either of such cases are by the said in part recited act directed to be sued for, and recovered, and disposed of.

Game of passage and other games with dice, &c. declared illegal within the 12 Geo. 2, c. 28.

Penalty on keepers of tables, &c.

Penalty on persons playing at those games.

And every person who shall set up, maintain, or keep any office, table, or place for the game of passage, or any other such game as aforesaid (except as excepted), shall severally forfeit as in stat. 12 Geo. 2, c. 28.

Several penalties.

Again, by 12 Geo. 2, c. 28, s. 4, every such sale or sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods or other things, by any game, lottery or lotteries, machine, engine, or other device whatsoever, depending upon, or to be determined by chance or lot, shall and are hereby declared to be void to all intents and purposes whatsoever: and all such houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods or other things, set up and exposed to sale in manner and form aforesaid, shall be forfeited to such person or persons who shall sue for the same, by action, bill, plaint, or information, in any of his Majesty's courts of record, or at the assizes for any county where the offence shall be committed; in which action, bill, plaint, or information, no essoin, protection, wager of law, or more than one imparlance shall be allowed.

Sales of property by lottery, &c. void;

and property forfeited, &c.

By stat. 42 Geo. 3, c. 119, intituled, "An Act to suppress certain Games and Lotteries not authorised by Law," it is enacted by s. 1 "that all games or lotteries, called Little Goes, shall from and after the passing of this act be deemed and are hereby declared common and public nuisances, and against law."

42 Geo. 3, c. 119. Little goes and other lotteries.

3. *Lotteries and little goes.*

42 Geo. 3, c. 119.

Persons keeping any place for a game or lottery not authorised by law, &c. shall forfeit 500*l.* &c.

Sect. 2. No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a Little Go, or *any other lottery whatsoever not authorised by Parliament*, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place, upon pain of forfeiting for every such offence the sum of 500*l.*, to be recovered in the court of exchequer, at the suit of his Majesty's attorney-general, and to be to the use of his Majesty, his heirs and successors; and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an act passed in the 17 Geo. 2, c. 5, and shall be punishable as such rogue and vagabond accordingly.

Vagrants.

By sect. 3, persons so offending, against whom no such information shall have been made, shall be punished as rogues and vagabonds, within the 17 Geo. 2, c. 5, and 27 Geo. 3, c. 1. But stat. 5 Geo. 4, c. 83, repeals the 17 Geo. 2, c. 5, and stat. 46 Geo. 3, c. 148, repeals the 27 Geo. 3, c. 1, see tit. "*Vagrant*."

Justices may authorise persons to break open doors of places where such offences committed, and apprehend offenders, &c.

Sect. 4. Upon complaint or information made upon oath before any justice or justices of the peace, of any offence committed against this act in any house or place within the jurisdiction of any such justice or justices, whereby any of the offenders may be liable to punishment as rogues and vagabonds, it shall and may be lawful to and for the said justice or justices before whom such oath shall be taken, if he or they shall judge it reasonable, by special warrant under his or their respective hands and seals, to authorise and empower any person or persons, by day or by night (but if in the night time, then in the presence of a constable or other lawful officer of the peace, who are hereby required to be aiding or assisting therein), to break open the doors or any part of such house or place where such offence shall have been committed, and to enter into such house or place, and to seize and apprehend all such offenders and all other persons who shall be discovered in such house or place and who shall have knowingly aided or assisted, or been any ways concerned with any such offender or offenders in committing such offence, and to convey them before any justice or justices of the peace of the county, riding, division, city, liberty, or place wherein such person shall be so apprehended, to be dealt with according to law as aforesaid; and all persons who shall be discovered in such house or place, knowingly aiding, assisting, or any ways concerned with such offender or offenders in the carrying on any transactions respecting the said little goes or lotteries, or either of them, shall be deemed rogues and vagabonds, and punishable in like manner, as is directed by the said recited act of the 17 Geo. 2, c. 5. [This act of 17 Geo. 2, c. 5, is now repealed by stat. 5 Geo. 4, c. 83. See tit. "*Vagrant*."] And it shall and may be lawful for the officer or officers having the execution of such warrant, and all other persons acting in his or their aid or assistance, to stop, arrest, and detain all and every the person and persons so discovered in such house or place, and to convey the said person and persons before such justice or justices of the peace as aforesaid; and if any person or persons shall forcibly obstruct, oppose, molest, or hinder, any such officer or officers, or others acting in his or their aid or assistance, in the due execution of their duty, or in the due entering into such house or place, or in the seizing, detaining, or conveying before such justice or justices any such offenders or other persons as aforesaid, every such person so obstructing, opposing, molesting, or hindering as aforesaid, shall be deemed an offender against law and the public peace, and the court before whom any such offender shall be tried and convicted shall and may order

Penalty for obstructing persons.

such offender to be fined, imprisoned, and publicly whipped, as in their discretion shall be thought fit; and all persons, although not discovered in such house or place as aforesaid, who shall employ or cause to be employed any person or persons in carrying on any of the transactions aforesaid, or in aiding or assisting any such person or persons, shall be deemed rogues and vagabonds, and shall be punishable in like manner as is directed by the 27 Geo. 3. c. 1. [But the 46 Geo. 3, c. 148, s. 64, repeals the 27 Geo. 3, c. 1.]

Sect. 5. From and after the passing of this act, no person or persons whatever shall, on or under any pretence, device, form, denomination, or description whatsoever, promise or agree to pay any sum or sums, or to deliver any goods, or to do or forbear doing any thing for the benefit of any person or persons, whether with or without consideration, on any event or contingency relative or applicable to the drawing of any ticket or tickets, lot or lots, numbers or figures, in any such game or lottery, or to publish any proposal for any of the purposes aforesaid; and if any person or persons shall offend in any of the matters aforesaid, he, she, or they shall, for every offence, forfeit and pay the sum of 100*l*.

Sect. 6. It shall and may be lawful for any person whatever to apprehend on the spot any person or persons so offending, and to convey or cause to be conveyed before any magistrate or justice of the peace residing near the place where such offence shall be committed the person or persons so apprehended, to be proceeded against under this act; and when any person or persons shall be apprehended or brought before any magistrate or justice aforesaid for any such offence, it shall be lawful for such magistrate or justice to proceed to examine into the circumstances of the case, and upon due proof upon oath or solemn affirmation of any such offence committed against this act, to give judgment or sentence accordingly, and where the party accused shall be convicted of such offence, and such penalty shall not be immediately paid, to commit such offender to prison for any space of time not exceeding 6 calendar months, nor less than 1 calendar month, without bail or mainprize, and without appeal, or until such penalty shall be satisfied; and every such penalty, when paid upon conviction, shall go and be applied, one third thereof to his Majesty, one third thereof to the use of the informer or informers, and the other third thereof to the person or persons apprehending or securing such offender or offenders.

Sect. 7. All provisions, powers, authorities, &c., contained in stat. 27 Geo. 3, c. 1, shall extend to all the provisions of this act.

Sect. 8. That if any sheriff's officer or other person or persons shall be sued, molested, or prosecuted for any thing done by virtue or in pursuance of this act, such sheriff's officer or other person or persons shall and may plead the general issue, and give this act and the special matter in evidence in his, her, or their defence or defences; and if afterwards a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs shall discontinue his, her, or their action or prosecution, or be non-suited, or judgment shall be given against him, her, or them, upon demurrer or otherwise, then such defendant or defendants shall have treble costs awarded to him, her, or them, against any such plaintiff or plaintiffs. But as regards treble costs, the recent act of 5 & 6 Vict. c. 97, s. 2, now entitles the defendant only to a full indemnity against costs.

By stat. 46 Geo. 3, c. 148, s. 59, All pecuniary penalties for any offence against any law touching or concerning lotteries, or against this act (except where it is herein otherwise directed), shall, when recovered, go and be applied to the use of his Majesty, his heirs or successors; it shall not be lawful for any person or persons whatever (except where it is herein otherwise directed) to commence or enter into, or cause or procure to be commenced or entered, or filed, or pro-

3. *Lotteries and little goes.*

42 Geo. 3, c. 119.

Persons agreeing to pay any sum, or to deliver any goods, &c. on any event relative to such game or lottery, or publishing any proposal, shall forfeit 100*l*.

Offenders may be apprehended on the spot, and carried before a justice, who shall, on the penalty not being paid, commit offender.

Application of penalty.

General issue.

Treble costs.

Penalties to go to the king, and to be sued for in name of attorney-general, &c.

3. *Lotteries and little goes.* secured, any action, suit, bill, plaint, or information, for the recovery of any pecuniary penalty or penalties inflicted by any of the laws touching or concerning lotteries, or by this act, unless the same be commenced, entered, filed, and prosecuted in the name of his Majesty's attorney-general in the court of exchequer at Westminster, if such offence shall be committed in England.
- 42 Geo. 3, c. 148. State lotteries. In *R. v. Liston* (6 *T. R.* 338, *Nolan*, 259), it was decided, that stat. 27 Geo. 3, c. 1, which contained an enactment nearly alike to the above enactment of 46 Geo. 3, c. 148, s. 59, and which is repealed by sect. 64 of that act, only extended to *State Lotteries*, and did not repeal the summary jurisdiction of magistrates over games of chance or lotteries prohibited by stat. 12 Geo. 2, c. 28. But the later case of *R. v. Tuddenham*, 9 *Dowl.* 871, has established that the above enactment extends to all lotteries, whether private or state lotteries, and that proceedings for the recovery of penalties relating to lotteries, contrary to the 42 Geo. 3, c. 119, must now be sued for in the name of the attorney-general, and not before magistrates.
- Bankrupt's certificate. Insuring in the lottery has been held not gaming within the repealed stat. 5 Geo. 2, c. 30, s. 12, so as to prevent a bankrupt's certificate being allowed. (*Lewis v. Piercy*, 1 *H. Bla.* 29. See the 6 Geo. 4, c. 16, s. 130.)
- Foreign lotteries. *Foreign Lotteries.*—By the stat. 9 Geo. 1, c. 19, ss. 4, 5, if any person shall, by virtue or colour of any grant or authority from any foreign prince or state, set up, continue, or keep, or cause or procure to be set up, continued, or kept, any lottery or undertaking in the nature of a lottery under any denomination whatsoever, or shall make, print, or publish, or cause, &c., any proposal for any such lottery or undertaking, or shall sell or dispose of any ticket in any foreign lottery, and shall be convicted thereof on oath of one witness before 2 justices where the offence shall be committed or the offender shall be found, he shall (over and above any penalties by former acts against unlawful lotteries) forfeit 200*l.*, one-third to the king, one-third to the informer, and one-third to the poor, to be levied by distress and sale by warrant of such justices, and shall also by them be committed to the county gaol for one year, and from thence till the said sum of 200*l.* be fully paid : Provided, that persons aggrieved may appeal to the next quarter sessions, and the judgment there to be final.
- Setting up, &c. And by stat. 6 Geo. 2, c. 35, ss. 29, 30, if any person shall sell, procure, or deliver any ticket, receipt, chance, or number, or division in any foreign or pretended foreign lottery, or in any class, part, or division thereof, or in any undertaking in the nature of a lottery, or shall sell, procure, or deliver any ticket, receipt, chance, or number in any duplicate or pretended duplicate of any foreign or pretended foreign lottery, or shall receive or cause to be received any money for any such ticket, receipt, chance, or number, or in consideration of any money to be paid in case any ticket or number in any foreign or pretended foreign lottery, or any class, part, or division thereof, shall prove fortunate, and shall be convicted thereof in the courts at Westminster, or on the oath or affirmation of one witness before two justices where the offence shall be committed or the offender shall be found, he shall forfeit 200*l.*, one-third to the king, one-third to the informer, and one-third to the poor where the offence shall be committed ; the same (in case of conviction before two justices) to be levied by distress and sale, by warrant of such justices : and shall also be committed to the county gaol for one year and from thence till the 200*l.* be paid : Provided, that persons aggrieved may appeal to the next quarter sessions, and the judgment there to be final.
- Penalty for. Selling or procuring chances in foreign lotteries.
- Penalty for. Appeal.
- 6 & 7 Will. 4, c. 66. By 6 & 7 Will. 4, c. 66, intituled "An Act to prevent the Advertising of Foreign and other Illegal Lotteries," reciting, whereas the laws in force are insufficient to prevent the advertising of foreign an

other illegal lotteries in this kingdom, and it is expedient to make further provision for that purpose: it is therefore enacted, that from and after the passing of this act, if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of or relating to the drawing or intended drawing of any foreign lottery, or of any lottery or lotteries, not authorised by some act or acts of parliament; or if any person shall print or publish, or cause to be printed or published, any advertisement or other notice of or for the sale of any ticket or tickets, chance or chances, or of any share or shares of any ticket or tickets, chance or chances, of or in any such lottery or lotteries as aforesaid, or any advertisement or notice concerning or in any manner relating to any such lottery or lotteries, or any ticket, chance, or share, tickets, chances, or shares thereof or therein; every person so offending shall for every such offence forfeit the sum of 50*l.*, to be recovered, with full costs of suit, by action of debt, bill, plaint, or information in any of his Majesty's courts of record in Westminster or Dublin respectively, or in the court of session in Scotland; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of the person who shall inform or sue for the same.

4. *Forms.*
Advertising
foreign or illegal
lotteries.

Penalty for.

By the 8 & 9 Vict. c. 74, s. 3, all fines, penalties and forfeitures under 6 & 7 Will. 4, c. 66, are to go wholly to her Majesty; and by s. 4, they are to be sued and prosecuted for only in the name of her Majesty's attorney-general or solicitor-general in England or Ireland, or of her Majesty's advocate-general or solicitor-general in Scotland, or of the solicitor of stamps and taxes in England or Scotland, or of the solicitor of stamps in Ireland, or of any person to be authorised to sue or prosecute for the same by writing under the hands of the commissioners of stamps and taxes, or in the name of any officer of stamp duties, by action of debt, bill, plaint or information in the court of exchequer at Westminster in respect of any fine, penalty or forfeiture incurred in England, and in the court of exchequer in Dublin in respect of any fine, penalty or forfeiture incurred in Ireland, and in the court of exchequer in Scotland in respect of any fine, penalty or forfeiture incurred in Scotland; and, except as is hereinbefore provided, it shall not be lawful for any person other than as aforesaid to inform, sue or prosecute for any such fine, penalty or forfeiture as aforesaid.

Lotteries.

IV. *Forms.*

For forms relating to keeping disorderly houses, see "*Disorderly House.*"

{ The jurors for our lady the Queen, upon their oath present, that A. B., (1). Indictment
to wit, } by fraud, unlawful devise and ill practice in playing at and with under 8 & 9 Vict.
cards, unlawfully did win from one C. D. (or, a certain person whose name is to c. 109, s. 17 (a)).
the jury unknown), a certain sum of money, with intent to cheat him the said C. D. of the same to the great damage of the said C. D., against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

{ The jurors for our lady the Queen, upon their oath present, that (2). Indictment
to wit, } C. D., on , by then playing at and with cards, to wit, at on 18 Geo. 2, c. 34,
a game called , with one A. B., within the space of twenty-four hours, s. 8, for losing
to wit, within the space of eight hours, unlawfully did lose at the said play, to more than 20*l.*
the said A. B., above the sum of twenty pounds, to wit, the sum of £ , within 24 hours.
to the evil example of all others, against the form of the statute in such

(a) This form was held good in *R. v. Moss*, 2 *Jur. N. S.* 1196.

Gaming and Lotteries.

4. Forms.

case made and provided, and against the peace of our said lady the Queen, her crown and dignity. [Add a count, omitting the name of the game, if doubtful.]

(3). Commitment for keeping a gaming-house.

[Commencement as usual, see "Commitment"] that the said C. D. on _____, at _____, unlawfully and injuriously did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play and game together, and then and there, in the said common gaming-house, unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain unlawfully playing and gaming. [Conclude as usual.]

(4). Indictment for keeping a common gaming-house.

The jurors of our lady the Queen, upon their oath present, that C. D., to wit. } on the _____ day of _____, in the year of our Lord _____, and on divers other days and times between that day and the day of taking this inquisition, a certain common gaming-house, there situate, for his lucre and gain, unlawfully and injuriously did keep and maintain, and in the said common gaming-house, on the day and year aforesaid, and on the said other days and times, there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to frequent and come together to game and play, and the said idle and ill-disposed persons to be and remain in the said common gaming-house, and to game and play together on the day and year aforesaid, and on the said other days and times there did unlawfully and injuriously procure, permit, and suffer, and the said persons, in the said common gaming-house there, on the day and year aforesaid, and on the said other days and times, by such procurement, permission, and sufferance of the said C. D., did game together, to the great encouragement of idleness and dissipation, to the great damage and common nuisance of all the liege subjects of our said lady the Queen, and against the peace of our said lady the Queen, her crown and dignity. And the jurors aforesaid, on their oath aforesaid, do further present, that the said C. D. on the day and year first aforesaid, and on divers other days and times between that day and the day of the taking this inquisition, a certain other common gaming-room and place in a certain house there situate, for his lucre and gain, unlawfully and injuriously did keep and maintain, and in the said common gaming-room and place, on the day and year first aforesaid, and on the said other days and times, there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to frequent and come together to game and play, and the said last-mentioned idle and ill-disposed persons to be and remain in the said common gaming-room and place, to game and play together, on the day and year first aforesaid, and on the said other days and times, there did unlawfully and injuriously procure, permit, and suffer, and the said last-mentioned persons, in the said common gaming-room and place, on the day and year aforesaid, and on the said other days and times, by such last procurement, permission, and sufferance of the said C. D. did game and play together, to the great encouragement of idleness and dissipation, to the great damage and common nuisance of the liege subjects of our said lady the Queen, and against the peace of our said lady the Queen, her crown and dignity. [Add other counts here, stating that defendant kept a common gaming-house, but omitting that the defendant kept the house, &c. for lucre and gain.]

Second count for keeping a common gaming-room and place.

Gaols & Houses of Correction (a).

(FOR COUNTIES AND RIDINGS, &c.)

AS to gaols and houses of correction for boroughs and corporate towns, see tit. "Corporation," Vol. I.

As to prisons for juvenile offenders, see *post*, "Gaols for Juvenile Offenders."

(a) It has not been thought necessary to insert the acts regulating the convict prisons.

Herein of—

*Gaols and
Houses of Cor-
rection.*

- I. *By what Authority Gaols erected, to whom they belong, Definition of Term, and as to Contracts for*, p. 864.
28 & 29 Vict. c. 126, ss. 4—7.
- II. *Obligation to maintain Prisons*, p. 866.
28 & 29 Vict. c. 126, ss. 8—9.
5 & 6 Vict. c. 98, ss. 10—11.
- III. *Gaols in Counties divided into Ridings, and Sessions for*, p. 866.
5 Geo. 4, c. 12, ss. 1—17.
- IV. *To what Gaol Prisoners are to be Committed, and Reception of them*, p. 870.
5 & 6 Will. 4, c. 38, ss. 3—4.
- V. *Appointment and removal of Officers, their Duties and Remuneration*, p. 875.
28 & 29 Vict. c. 126, ss. 10—16.
- VI. *Discipline of Prisoners, and Government of Prisons*, p. 878.
28 & 29 Vict. c. 126, ss. 17—22, and schedule I.
- VII. *Building, Enlargement, and Rebuilding of Prisons, and Provision for Expenses of*, p. 892.
28 & 29 Vict. c. 126, ss. 23—30.
- VIII. *Contracts for Maintenance of Prisoners and Appropriation of Prisons*, p. 893.
28 & 29 Vict. c. 126, ss. 31—34.
29 & 30 Vict. c. 100, ss. 1—4.
- IX. *Inadequate Prisons may be closed, and Government Allowance withheld*, p. 895.
 1. *Government Allowance withheld from inadequate Prisons.*
 2. *Power of Secretary of State to close inadequate Prisons.*
28 & 29 Vict. c. 126, ss. 35, 36.
- X. *Offences in relation to Prisons*, p. 896.
28 & 29 Vict. c. 126, ss. 37—40.
- XI. *Discharge of Prisoners*, p. 897.
28 & 29 Vict. c. 126, ss. 41—43, and 25 & 26 Vict. c. 44, s. 1.
- XII. *Purchase of Land for Prisons, and Sale of unnecessary Prisons*, p. 898.
Conditions of Sale.
28 & 29 Vict. c. 126, ss. 44—47.
- XIII. *Recovery of Penalties, Actions, Inquests on Prisoners*, p. 899.
28 & 29 Vict. c. 126, ss. 48—52.
- XIV. *Visiting Justices*, p. 899.
28 & 29 Vict. c. 126, ss. 53—55.
- XV. *Law of Prisons generally*, p. 900.
 1. *Abolition of Distinction between Gaol and House of Correction.*
 2. *Jurisdiction over Prison.*
 3. *Custody of Prisoners.*

Gaols and Houses of Correction.

1 *Erection of
gaols, &c.*

4. *Security to Sheriff, and his Responsibility.*
5. *Description of Prison in Writ.*
6. *Gaoler of Prison to deliver Calendar.*
7. *Removal of Prisoners for Trial, and in other cases
Custody and Trial of.*
8. *Misdemeanants of First Division.*
9. *Fees to Gaolers on Discharge of Prisoners.*
28 & 29 Vict. c. 126, ss. 56—67.
55 Geo. 3, c. 50.

XVI. *Discontinuance of certain Prisons, and Removal of Prisoners,*
p. 904.

28 & 29 Vict. c. 126, ss. 68—72.
31 Vict. c. 21.

XVII. *Regulations as to Executions within Prisons,* p. 907.

31 & 32 Vict. c. 24.

XVIII. *Repeal of Statutes, and Saving Clauses,* p. 909.

28 & 29 Vict. c. 126, ss. 73—82.

I. **By what Authority erected and maintained.—To whom
they belong.—Definition of Terms and as to Contracts
for.**

None to be erected
but by statute.

Gaols are of such universal concern to the public, that none can be erected by any less authority than by act of parliament. (2 *Inst.* 705.)

Hence the coroner is to inquire of the death of all persons whatsoever who die in prison, to the end that the public may be satisfied whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them, by those under whose power they were confined. (3 *Inst.* 52, 91.)

To whom they
belong.

Also, all prisons or gaols belong to the queen, although a subject may have the custody or keeping of them. (2 *Inst.* 100.)

The principal gaol act now in force is the 28 & 29 Vict. c. 126 (Prisons Act, 1865), which repeals the former gaol act, 4 Geo. 4, c. 64, and numerous other statutes passed since that date (a). It does not apply to convict, naval, or military prisons.

2 & 3 Vict. c. 56.
Definition of
terms.

By 28 & 29 Vict. c. 126, s. 4, it is enacted that in this act, and in any act applied or incorporated by this act, the expressions hereinafter mentioned shall have the meanings hereinafter attached to them, unless there is something in the tenor of the act inconsistent with such meanings; that is to say,

"Municipal
borough" and
"Borough:"

"Municipal borough" shall mean any place for the time being subject to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76 (b), and any acts amending the same, and "borough" shall include "municipal borough:"

"Prison:"

"Prison" shall mean gaol, house of correction, bridewell, or penitentiary; it shall also include the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto:

"Gaoler:"

"Gaoler" shall mean governor, keeper, or other chief officer of a prison:

"Clerk of the
peace:"

"Clerk of the peace" shall include any officer performing similar duties to those of a clerk of the peace:

"Treasurer:"

"Treasurer" shall include any officer performing duties similar to those of treasurer:

(a) See list of these statutes, *post*,
p. 909.

(b) For the amending acts, see
"*Corporations, Municipal.*"

"Quarter sessions" shall include "general sessions :"

"Criminal prisoner" shall mean any prisoner charged with or convicted of a crime.

1. *Erection of gaols, &c.*

Sect. 5. The persons hereinafter named shall be prison authorities for the purposes of this act; that is to say,

1. As respects any prison belonging to any county, except as hereinafter mentioned, or to any riding, division, hundred, or liberty of a county, having a separate court of quarter sessions, the justices in quarter sessions assembled :
2. As respects any prison belonging to a county divided into ridings or divisions, and maintained at the common expense of such ridings or divisions, the justices of the county assembled at a court of gaol sessions held in manner provided by the 5 Geo. 4, c. 12 :
3. As respects any prison belonging to the city of London, or the liberties thereof, the court of the lord mayor and aldermen :
4. As respects any prison belonging to a municipal borough, the council of the borough :
5. As respects any prison belonging to any district, liberty, city, borough, or town having a separate prison jurisdiction, and not hereinbefore mentioned, the justices, council, or other persons having power at law to build, enlarge, or repair such prison, assembled at any gaol session or other formal meeting of their body.

28 & 29 Vict. c. 126.

"Quarter sessions :"

"Criminal prisoner."

Description of "Prison authorities."

Sect. 6. The expression "justices in sessions assembled" shall mean as follows; that is to say,

1. As respects any prison belonging to any county, except as hereinafter mentioned, or to any riding, division, hundred, or liberty of a county, having a separate court of quarter sessions, the justices in quarter sessions assembled :
2. As respects any prison belonging to any county divided into ridings or divisions, and maintained at the common expense of such ridings or divisions, the justices of the county assembled at gaol sessions :
3. As respects any prison belonging to the city of London, or the liberties thereof, the court of the lord mayor and aldermen :
4. As respects any prison belonging to any municipal borough, the justices of the borough assembled at sessions to be held by them at the usual time of holding quarterly sessions of the peace, or at such other time as they may appoint :
5. As respects any prison belonging to any city, district, borough, or town having a separate prison jurisdiction, and not hereinbefore mentioned, the justices or other persons having power at law to make rules for the government of such prison.

Definition of "Justices in sessions assembled."

Sect. 7. The provisions of the 21 & 22 Vict. c. 92, shall apply to all contracts, mortgages, or conveyances entered into or executed in pursuance of this act by or on behalf of or with the justices of any county, riding, division, hundred, or liberty of a county in general or quarter sessions assembled; and in the construction of that act the expression "justices in quarter sessions assembled" shall include the justices of the county in gaol sessions assembled, in pursuance of the 5 Geo. 4, c. 12, and shall also include the bailiff and justices of the liberty of Romney Marsh assembled at any sessions or meeting. And all contracts, mortgages, or conveyances entered into or executed in pursuance of this act by or on behalf of or with any other prison authority shall be entered into and executed in manner in which such instruments or deeds are usually entered into by such authority.

Contracts, &c. by prison authority in counties.

2. *Obligation to maintain prisons.*

28 & 29 Vict. c. 126.

Maintenance of prisons by separate prison jurisdiction.

Definition of separate prison jurisdiction.

5 & 6 Vict. c. 98.

Extending the period for repayment of loans in counties.

Justices, on presentment, may provide more than one gaol.

II. Obligation to maintain Prisons.

Sect. 8. There shall be provided, at the expense of every county, riding, division, hundred, liberty, franchise, borough, town, or other place, having a separate prison jurisdiction, adequate accommodation for its prisoners in a prison or prisons constructed and regulated in such manner as to comply with the requisitions of this act in respect of prisons.

All expenses incurred by a prison authority in carrying into effect the provisions of this act shall be defrayed out of the county rate, or rate in the nature of a county rate, borough rate, or other rate leviable in the county, riding, division, hundred, liberty, franchise, borough, town, or other place having a separate prison jurisdiction, and applicable to the maintenance of a prison, or out of any other property applicable to that purpose.

Sect. 9. For the purposes of this act every county, riding, division, hundred, liberty, franchise, borough, town, or other place shall be deemed to have a separate prison jurisdiction which maintains a separate prison, or would be liable at law to maintain a separate prison if accommodation were not provided for its prisoners in the prison of some other jurisdiction.

Where a county is divided into ridings or divisions, and a prison is maintained at the common expense of such ridings or divisions, that county shall in relation to such prison, and for the purposes thereof, be deemed to have a separate prison jurisdiction, notwithstanding a separate county rate is not levied in such county at large.

By 5 & 6 Vict. c. 98, s. 10, it is enacted, that when the justices of any county shall have borrowed any money for building, rebuilding, repairing, or enlarging any prison, they shall charge the rate to be raised upon such county, not only with the interest of the money so borrowed, but also with the payment of such further sum as will insure the payment of the whole sum borrowed within 30 years, or if the loan shall have been made by the commissioners appointed for the execution of the acts authorising the issue of exchequer bills, within 20 years from the time of borrowing the same.

And the same act, by s. 11, enacts, that if it shall be expressly presented that one common gaol is insufficient for any county, riding, parts, or division of a county, having a distinct commission of the peace, or a distinct rate in the nature of a county rate, applicable to the maintenance of a prison for such division, the justices of such county, riding, parts, or division of a county, by orders made for that purpose, may provide and maintain two or more common gaols for such county, riding, parts, or division, and for that purpose shall have the same powers which they have for providing, building, repairing, and maintaining therein one common gaol, and for purchasing and holding the site thereof; and all laws and enactments in force with respect to one common gaol shall be enforced with respect to any additional gaol or gaols which may be hereafter provided; and all persons who may be committed to the common gaol, or kept therein, either before or after trial, may be committed to or kept, either before or after trial, in any such additional gaol, and shall be there in the custody of the sheriff; and the sheriff shall appoint and may remove the keeper of every such additional gaol.

III. Gaols in Counties divided into Ridings, &c., and Sessions for such Gaols.

5 Geo. 4, c. 12, reciting 4 Geo. 4, c. 64.

By stat. 5 Geo. 4, c. 12, it is enacted, that in every county divided into ridings or divisions, having distinct commissions of the peace, there shall be held, from time to time, a court of sessions for the gaol

of such county, of which court all the justices of the peace of every riding and division of such county shall be members; and any two of such justices shall be able to hold such court; and such court shall possess and exercise all the powers and authorities respecting the common gaol of such county, and all matters relating thereto, which are in and by the said recited act vested in the court of general or quarter sessions of the peace for any other county of England; and the justices of the peace for each of such ridings and divisions are hereby authorised as fully and effectually to perform and execute all the provisions and regulations of the said recited act, with respect to such county gaol, as justices of the peace for the county are in any other county of England authorised to do, with respect to the gaol of their respective counties; and the said court of gaol sessions is hereby empowered to transact and do, within the counties so divided, all such matters and things appertaining to the authority of justices of the peace in sessions assembled, with respect to the county gaol, as are in other counties capable of being done by justices of the peace in their general or quarter sessions assembled; and where by the said act any thing is ordered to be done at any general or quarter sessions, or at any adjournment thereof, or at any subsequent general or quarter sessions, or adjournment thereof, respecting the county gaol, then such things may be done at such gaol sessions, or at any adjournment thereof, or at one or more subsequent gaol sessions, in such ways and with such public notices as in the said recited act they are ordered or directed to be done by the general or quarter sessions, or adjournment thereof.

Sect. 2. The sheriff of every county so divided into ridings or divisions shall, within 14 days next after the passing of this act, by notice to be published in the London Gazette, and in some of the public newspapers most usually circulated within his county, summon the justices of each of the ridings or divisions into which the same is divided to meet at some place in or near the county gaol, to be by him specified in such notice, and at a time not exceeding one month after the first publication of such notice, and there to form a court of sessions for the county gaol, for the purpose of carrying into execution the regulations and provisions of the said recited act and of this act; and the said court, being so constituted, shall proceed to elect a chairman and a clerk; and the said court, and the chairman thereof, shall proceed to execute all those matters and things which were by the said recited act directed to be done by the court of quarter sessions of the peace, held at Michaelmas next after the passing thereof, and by the chairmen of that court, and to do all such other matters and things as may be necessary or proper in regard to the county gaol.

Sect. 3. The clerk of the gaol sessions shall continue in his office until another shall be elected in his stead by the court of gaol sessions, and shall, with respect to the said recited act and this act, have and enjoy all the powers vested by the said recited act in the clerk of the peace of any county.

Sect. 4. The clerk of the gaol sessions shall, on receiving a precept commanding him so to do, signed by any 2 justices of the peace acting for any of the ridings or divisions of the county, summon the justices to meet in a court of gaol sessions, by a notice to be published at least twice in some of the public newspapers most usually circulated in the county; which notice shall declare the day, hour, and place at which such court is to be held; and also that the said clerk, if the court of gaol sessions shall be dissolved without adjournment, or shall adjourn for a longer time than 3 calendar months, shall, by a like notice to be issued of his proper authority, without any precept in that behalf, summon a court of gaol sessions to be held within 3 calendar months next after such dissolution or last adjournment.

Sect. 5. The sessions for the county gaol shall be held in some place in the gaol, or within one mile thereof, unless there shall be special

3. *Gaols for counties divided into ridings, &c.*

5 Geo. 4, c. 12.

In counties divided into ridings or divisions, a court of sessions for the gaol shall be held; and such court shall possess all powers given by the former act respecting the common gaol of such county.

Sheriff to give notice in the London Gazette, &c. of the holding such court.

Chairman and clerk to be appointed.

Power and duty of such court.

Continuance in office by clerk of gaol sessions.

Notice of holding gaol sessions in the public newspapers.

Place for holding sessions for the county gaol.

3. *Gaols for counties divided into ridings, &c.*

5 Geo. 4, c. 12.

Treasurer to be appointed,

to account upon oath.

Court to appoint salaries.

Proportions of county rates to be paid by each riding or division.

In case of dispute as to such proportions, the same to be settled by arbitrators appointed by the justices or one justice of assize on circuit.

* *Sic.*

* *Sic.*

Award final for ten years, and until further order.

reasons for the contrary, which shall be expressed in the precept to be directed to the said clerk as aforesaid; and if it shall be held in the gaol, or within such distance thereof as aforesaid, all matters done thereat touching the county gaol shall be legal, though the sessions be held in some place not within the county.

Sect. 6. The court of gaol sessions shall also elect a treasurer of the monies applicable to the repair of the county gaol, [who shall not be the clerk of the said court; and the said treasurer shall receive and pay all monies to be raised for the repair of the county gaol, or to be disbursed by order of the court, and shall give discharges for the monies received, and apply the same as by such court shall be ordered, and shall keep a distinct account of such monies received and paid, and shall, from time to time, when called on by the said court, account upon oath, if required, for all monies so by him received, and deliver in all vouchers respecting the same; and the said court shall, from time to time, appoint such salaries to each clerk and treasurer respectively as they shall think fit, to be paid out of the monies aforesaid; and such treasurer shall give such security for the faithful performance of his duty as the court of gaol sessions shall direct.

Sect. 7, reciting that it is expedient that all the expenses incurred respecting any county gaol, where the county is so divided as aforesaid, whether arising out of the provisions of the said recited act or of this act, or otherwise, should be discharged out of the county rates; and it is necessary to fix the proportions in which the several ridings or divisions shall contribute to such expenses; and it may also be necessary, from time to time, to vary the said proportions, enacts, that where, in any such county, there are, at the time of passing this act, any fixed proportions in which such expenses are or have been paid and borne, such proportions shall continue to be acted on, and the contributions shall be paid accordingly, till some alterations shall be made therein by the court of gaol sessions; and that where there are now no such fixed proportions, the said court shall forthwith fix the proportions in which the contribution is to be made; and the said court shall also have power and authority to alter the said proportions from time to time; provided that no such alteration shall be made, unless the intention of making such alteration shall be expressed in the notice whereby the court is summoned, and shall be published for one month, at the least, before the court shall be held.

Sect. 8. When the court of gaol sessions shall order an alteration to be made in the proportions in which the ridings or divisions of the county are to contribute towards the expenses of the county gaol, or shall negative a proposition for making such alteration, and any riding or division shall be dissatisfied therewith, it shall be lawful for the clerk of the peace of such riding or division, being thereunto authorised by an order of the court of quarter or gaol sessions of such riding or division, to apply to the justices of assize of the last preceding circuit, or of the next succeeding circuit, or to one of such justices, who shall, by writing under their or his hands or hand, nominate a barrister at law, not having any interest in the question, to arbitrate between the ridings or divisions; and such arbitrators * shall summon the several clerks of the peace of the ridings or divisions interested in the matter in dispute to appear before him, * at a time to be by him appointed, and there to produce all information touching the matter in dispute; and such arbitrator may, if he shall see fit, adjourn the hearing from time to time, and require all such further information to be afforded by either of the parties as shall appear to him meet and necessary; and shall, by his award in writing, determine the proportions in which such ridings or divisions shall contribute towards the said expenses; and his award shall be final and conclusive between the parties for 10 years, and until further order shall be made thereon by the court of gaol

sessions; and such arbitrators shall also assess the courts * (a) of the arbitration, and shall direct by whom and out of what fund the same shall be paid.

By stat. 5 Geo. 4, c. 12, s. 9, when and so often as the court of gaol sessions shall find it requisite to raise money for the purposes of the said recited act [4 Geo. 4, c. 64] (b), or of this act, they shall make an order accordingly, and their clerk shall forthwith transmit a copy of such order, signed by the chairman, together with the amount of the sum of money to be paid by virtue of it, according to the then existing proportions, by each riding or division, to the treasurers of the several ridings or divisions of the county; which treasurers shall forthwith, out of the monies in their hands, or if those monies shall be insufficient, then so soon as sufficient monies shall come to their hands, pay the sum required to the treasurer of the county gaol, and take his receipt for the same.

Sect. 10. When the monies necessary to be raised for the purposes of the said recited act, or of this act, shall exceed one half of the ordinary aggregate amount of all the annual assessments for the rates of the several ridings or divisions of any such county, taken on an average of all such rates for the last 7 years preceding, the court of gaol sessions may, and is hereby authorised to, mortgage all the rates of such county, by such instrument, and in such ways and means, and under such provisions of repayment, and with the same power of assignment, as in the said recited act are enacted respecting the mortgage of any county rates therein mentioned.

Sect. 11. The court of gaol sessions shall, and is hereby required, to charge all the rates upon the several ridings and divisions of the county, in the same manner and for the same purposes as in and by the said recited act the justices in their general or quarter sessions are authorised and required to charge the rates of any county having one rate for the whole; and all the ways, means, and methods by the said recited act directed and allowed, as to the repayment of monies borrowed, and the interest thereof, and the accounts respecting the same, shall be kept and observed by the court of gaol sessions respecting the monies borrowed on account of the gaol of any county so divided as aforesaid; provided that all the monies to be raised on the several ridings or divisions of any such county, for repaying money borrowed, or the interest thereof, shall be raised in the same proportions as other monies for the purposes of the said recited act or of this act shall be raised at the time of such money being so raised.

Sect. 12. All reports and statements directed by the said recited act to be made to the general or quarter sessions shall be transmitted on or before the first days of January, April, July, and October, to the clerk of the gaol sessions, and be by him laid before the court at the sessions.

Sect. 13. The chairman of the first court of gaol sessions held after the first day of October in each year, shall within 14 days after the determination of such sessions, or any adjournment thereof, transmit to one of his Majesty's principal secretaries of state such account of proceedings, and such copies of rules and regulations, as in and by the said act are ordered to be transmitted by the chairman of the Michaelmas quarter sessions, and shall at the same time, or within 3 months afterwards, transmit such plans as in the said act are mentioned.

Sect. 14. The return directed to be made annually by the keeper of every prison, in the form contained in the schedule annexed to the said recited act, marked (B) (b), shall be annually made by the keeper of every

3. *Gaols for counties divided into ridings, &c.*

5 Geo. 4, c. 12.

* *Sic.*

Order for money to be transmitted to treasurers of the several ridings or divisions.

Rates may be mortgaged for raising the money.

Rates on each riding or division to be charged in same manner as rates on counties by recited act.

Reports under 4 Geo. 4, c. 64, s. 23, laid before gaol sessions.

Reports, &c. transmitted by chairman of court of gaol sessions to secretary of state.

Returns from keeper of prisons to be delivered to clerk of gaol sessions.

(a) This should be "costs."

(b) Now repealed by 28 & 29 Vict. c. 126.

4. To what gaols prisoners are to be admitted, and reception of them.

5 Geo. 4, c. 12.

By whom convictions for recovery of fines, &c. to be made.

Common gaol of county to be deemed within each riding or division.

gaol of every county so divided as aforesaid, and delivered to the clerk of the gaol sessions of such county 2 weeks at least before the first day of October in each year; and that such clerk shall, on the said first day of October, prepare a general report founded on the report of the visiting justices and that of the chaplain, and on the certificates and reports of the keeper of the said gaol, and on any other report or document respecting the said gaol, and shall lay the same before the next gaol sessions; and such report, when approved by such sessions, shall be signed by the chairman thereof, and shall be by him, together with a copy of the schedule (B), transmitted to one of his Majesty's principal secretaries of state, for the purposes in the said recited act mentioned.

Sect. 15. If any matter or thing be done within any county so divided as aforesaid, for which any fine, penalty, or forfeiture is by the said recited act [4 Geo. 4, c. 64] (a) imposed and directed to be paid to the county treasurer, every conviction made in pursuance of the said recited act for such matter or thing shall be made by one or more justices of the peace of the riding or division in which the offence is committed; and all forfeitures, fines, and penalties thereon accruing shall be paid to the treasurer of the county gaol, for the purposes of this act.

Sect. 16. In the case of every county so divided as aforesaid, the common gaol of such county shall, for all purposes relative to the jurisdiction of justices of the peace, be deemed to be within and taken as part of each of the ridings and divisions of which such county is composed; and every justice of the peace for each of such ridings and divisions shall have like power and authority to execute all things appertaining to his office therein, as in any part of the riding or division to which his commission specially extends.

IV. To what Gaols Prisoners are to be Committed, and Reception of them.

As to what gaol an offender should be committed, and the commitment of offenders in general, see title "*Commitment for Safe Custody*," and see *post*, "*Law of Prisons*."

5 & 6 Will. 4, c. 38.

Justice empowered to commit offenders to any house of correction near the place where the assizes are to be holden at which they are to be tried.

Stat. 5 & 6 Will. 4, c. 38, s. 3, enacts, that from and after the passing of this act it shall be lawful for any justice of the peace or coroner, acting within their several jurisdictions in England and Wales, to commit for safe custody to any house of correction, situate near to the place where such assizes and sessions are intended to be holden, any person or persons charged before them with any offence triable at such assizes or sessions; and that whenever any such persons shall be committed to any such house of correction for trial at such assizes or sessions, the keeper of such house of correction shall deliver to the judges of assize or justices at sessions a calendar of all prisoners in his custody for trial at such assizes or sessions respectively, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of the county (b).

How persons convicted of offences for which they are liable to death, &c. shall be disposed of.

Sect. 4. Whenever any person shall be convicted at any assizes or sessions of any offence for which he or she shall be liable either to the punishment of death, transportation, or imprisonment, it shall be lawful for the court (if it shall so think fit) to commit such person to any house of correction for such county, in execution of his or her judgment; and in case of the commitment of any person sentenced to death, ex-

(a) Now repealed.

(b) The sheriff is no longer required to deliver such calendar, but

the gaoler is by 28 & 29 Vict. c. 126, s. 62.

cution of such judgment shall and may be had and done by the sheriff of the county; and in case of the commitment of any person either sentenced to transportation, or pardoned for any capital offence on condition of transportation, all the powers, provisions, and authorities for the removal of offenders sentenced to transportation, given or granted by any former act or acts of parliament to sheriffs or gaolers, shall be and the same are hereby extended and given to the keepers of houses of correction in whose custody such last-mentioned offenders shall be (a).

See the case of *Aaron v. Alexander* (3 Camp. 35), wherein it is held that the keeper of a prison, who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person, and is liable for the consequences if it is not.

By 13 & 14 Vict. c. 91, intituled "An Act to authorise Justices of any Borough having a separate Gaol to commit Assize Prisoners to such Gaol, and to extend the Jurisdiction of Borough Justices to all Offences and matters arising within the Borough for which they act," (b) it is enacted (s. 1), "that it shall be lawful for any justice of the peace acting for any city or borough now having or providing and maintaining at its own costs, or which shall hereafter have or provide and maintain at its own cost, a gaol or house of correction, to commit for safe custody to such gaol or house of correction, for trial at the assizes to be holden for the county in which such city or borough may be situated, any person charged before him with any offence, except murder, committed within the limits of such city or borough triable at such assizes, and the commitment shall specify that such person is committed under the authority of this act, and whenever any such person shall be committed to any such gaol or house of correction for trial at such assizes, the keeper of such gaol or house of correction shall deliver to the judges of assize a calendar of all prisoners in his custody for trial at such assizes, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of the county in which such city or borough may be situated; and the justice or justices by whom any person charged as aforesaid shall be committed shall deliver or cause to be delivered to the proper officer of the court the several recognizances, informations, depositions and statements relative to such person at the time and in the manner that would be required in case such person had been committed to such county gaol.

Sect. 2. Provided always, that nothing herein contained shall be construed to give any justice of the peace acting for any city or borough power to commit persons charged with murder to the gaol or house of correction of any city or borough for trial at the assizes to be holden for the county in which such city or borough may be situated, but such justices shall and they are hereby authorised and required to commit all such persons to the common gaol of such county for trial in such and the same manner as if this act had not passed: provided also, that the expenses properly incurred by such county in the maintenance, safe custody and care of such last-mentioned prisoners so committed whilst in custody in such county gaol shall be borne and paid by such city or borough in the manner hereinafter provided with respect to prisoners removed to the county gaol for trial at the assizes.

Sect. 3. That all persons who may under the authority of this act be committed to the gaol or house of correction of any city or

4. To what gaols prisoners are to be admitted, and reception of them.

5 & 6 Will. 4, c. 38.

Execution of death to be by sheriff.

13 & 14 Vict. c. 91.

Prisoners may be committed to borough gaols for trial at the assizes.

Nothing to authorize justices to commit persons charged with murder to any other than the county gaol.

As to expenses incurred in maintenance of last-mentioned prisoners.

Prisoners committed to borough gaols to be re-

(a) Transportation is now abolished.

25 L. J. M. C. 73, and 5 & 6 Vict.

(b) See as to district courts and gaols, *Mauston v. Mayor of Colchester*,

c. 98, so far as it is not repealed by 28 & 29 Vict. c. 126.

4. *To what gaols prisoners are to be admitted, and reception of them.*

13 & 14 Vict. c. 91.
moved to county gaol previous to trial.

Prisoners whilst under removal to be deemed to be in proper legal custody.

Expenses of prisoners removed to county gaols to be calculated as provided by 5 & 6 Vict. c. 98, ss. 18, 20.

Account of expenses to be made out and signed by clerk to justices, and sent to town clerk of borough.

In cases of conviction for offences committed within limits of any city, &c., court may commit offender to borough gaol.

In case of commitment of persons.

borough for trial at the assizes to be holden for the county in which such city or borough may be situated shall in due time be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of the county in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

Sect. 4. That every prisoner so removed shall for and during the time of such removal, and also for and during such time as he shall be detained in the county gaol, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding he may in effecting such removal have been taken out of the jurisdiction of the city or borough to the gaol or house of correction of which he may have been originally committed into any other jurisdiction, or out of the county in which such gaol or house of correction may be situated into or through any other county or division of a county; and no action or other proceeding shall or may be maintained by such prisoner or by any other person against the gaoler or keeper of the gaol or house of correction of any city or borough, or against the gaoler or keeper of the common gaol of the county, by reason or in consequence of such prisoner having been taken out of the jurisdiction of such city or borough into any other jurisdiction, or out of the county in which such city or borough may be situated into or through any other county or division of a county.

Sect. 5. That the expenses which shall be incurred by such county in the maintenance, safe custody and care of every prisoner so removed whilst in custody in such county gaol, shall be calculated upon the same principle and in the same manner as provided by 5 & 6 Vict. c. 98, with respect to borough prisoners committed to a county prison where no special contract is subsisting between such borough and county relative to such prisoners; and such expenses, and all other expenses which may be incurred by such county in respect of every such prisoner, shall be paid by the council of such city or borough to the treasurer of such gaol or county; and the amount of all such expenses shall, in case of dispute, be settled by a barrister at law in the manner provided by the said act.

Sect. 6. That an account in writing of the expenses due and payable, or claimed to be due and payable, in respect of the maintenance, safe custody and care of such prisoners as aforesaid, shall be made out from time to time, and signed by the clerk to the visiting justices of the county gaol to which such prisoners shall have been committed, and delivered to the town clerk of the city or borough within which the offences shall have been committed; and such account shall be conclusive against such city or borough, unless some objections shall be made in writing, and signed by the town clerk of such city or borough, and delivered to the clerk of the said visiting justices, within one calendar month next after such account shall have been delivered to such town clerk.

Sect. 7. That whenever any person shall be convicted at any assizes of any offence committed within the limits of any city or borough having or providing and maintaining at its own cost a gaol or house of correction, for which offence such person shall be liable either to the punishment of transportation or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to such gaol or house of correction, in execution of his judgment; and in case of the commitment of any person either sentenced to transportation or pardoned for any capital offence on condition of transportation, all the powers, provisions and authorities for the removal of offenders sentenced to transportation given or granted by any former act or acts of parliament to sheriffs or gaolers shall be and the same are hereby extended and given to the gaoler or keeper of the gaol or house of correction in whose custody such offender shall be.

Sect. 8. That all the provisions hereinbefore contained with reference to the removal of prisoners from any city or borough gaol to the county gaol for trial at the assizes shall be applicable and shall be applied to the removal from the county gaol to any city or borough gaol of any prisoner who, having been convicted at the assizes, shall be committed by the court to such gaol or house of correction, in execution of his judgment.

Sect. 9. That after the passing of this act the justices of every city or borough shall have the same jurisdiction with respect to all offences committed and matters arising within such city or borough as the justices of the county in which such city or borough is situate now have under or by virtue of any local or general act of parliament; and such offences and matters shall be cognisable by one or more of the justices of such city or borough in the same manner as such offences and matters are now cognisable by one or more of the justices of such county: provided always, that in every case in which imprisonment may be awarded for or in respect of any such offences or matters aforesaid, or to enforce payment of any penalty, rate, sum of money or costs imposed or made payable by or by virtue of any such general or local act or otherwise, such imprisonment may be awarded to take place in any gaol or house of correction to which the justices of the said city or borough now have or hereafter may have power to commit offenders.

Sect. 10. That throughout this act, where there shall be nothing in the subject or context repugnant to such construction, words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number, and words importing the masculine gender only shall include females.

Sect. 11. That this act shall extend only to England and Wales.

And by 14 & 15 Vict. c. 55, s. 19, it is enacted, that whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her Majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county: and whenever any such person shall be so committed, the keeper of such gaol or house of correction shall deliver to the judges of assize for such next adjoining county a calendar of all prisoners in his custody so committed, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such adjoining county; and the justice, justices or coroner by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices or coroner having authority so to commit, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such ad-

4. *To what gaols prisoners are to be admitted, and reception of them.*

13 & 14 Vict. c. 91.

Provisions as to removal before trial to apply to removal after conviction.

Borough justices to have the same jurisdiction as county justices under any local act as to offences committed within the borough.

Interpretation of terms.

Extent of act.

14 & 15 Vict. c. 55.

In certain counties of cities and towns prisoners may be committed, and tried at assizes held for adjoining county.

4. *To what gaols prisoners are to be admitted, and reception of them.*

14 & 15 Vict. c. 55.

Justices to declare when gaols or houses of correction are fit prisons for persons committed for trial.

joining county as in the case of persons charged with offences of the like nature committed within such county.

Sect. 20. It shall be lawful for the justices of the peace, at their general or quarter sessions for any county, riding, or division, by order made for that purpose, to declare that any gaol or house of correction for such county, riding, or division, is a fit prison for persons committed for trial at the assizes for such county, or for the county of such riding or division; and every such order shall be signed by the chairman of such sessions, and transmitted to one of her Majesty's principal secretaries of state; and in case such secretary of state see fit to approve such order, then, after the approval thereof under the hand of such secretary of state, it shall be lawful for any justice or justices of the peace, or coroner, acting for such county, riding, or division, to commit for safe custody for trial at the next assizes, to such gaol or house of correction, any person charged with any offence triable at the assizes for such county, or for the county of such riding or division; and the commitment shall specify that such person is committed under the authority of this act; and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the county; and the keeper of such gaol or house of correction shall deliver to the judges of assize a calendar of all prisoners in custody for trial at such assizes, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such county; and the justice, justices, or coroner by whom persons charged as aforesaid may be committed shall deliver or cause to be delivered to the proper officer of the court of assize the several examinations, informations, evidence, recognizances, and inquiries relative to such persons at the time and in the manner that would be required in case such persons had been committed for trial as aforesaid to such common gaol, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such county, as in the case of persons so committed to such common gaol.

Prisoners so committed to be removed to county gaol previous to trial.

Sect. 21. All persons who may under the authority of this act be committed to the gaol or house of correction of any county of a city or county of a town corporate for trial at the assizes to be holden for the next adjoining county, or to any gaol (other than the common gaol of the county) or house of correction for any county, riding, or division for trial at the assizes for such county, or for the county of such riding or division, shall in due time, without writ of *habeas corpus* or other writ for that purpose, be removed by the gaoler or keeper of such gaol or house of correction, with their commitments and detainers, to the common gaol of such county, in order that they may be tried at the assizes to be holden for such county, and such removal shall not be deemed or taken to be an escape.

Prisoners while under removal to be deemed in proper legal custody.

Sect. 22. Every prisoner so removed shall, for and during the time of such removal, and for and during the time of his being removed back to the gaol or house of correction from which he may have been brought, when and as often as he shall for any reason be so removed back, and also for and during such time as he may be detained in the county gaol, and until he shall be delivered by due course of law, be to all intents and purposes deemed and considered to be in the proper legal custody, notwithstanding he may in effecting such removal have been taken or detained out of the jurisdiction of the county of a city or town, or out of the jurisdiction of the county, riding, or division, to the gaol or house of correction of which he may have been originally committed, into any other jurisdiction, or out of the county to the common gaol of which he is removed into or through any other county or division of a county; and no action or other proceeding shall or may

be maintained by such prisoner, or by any other person, against the gaoler or keeper of the gaol or house of correction from which such prisoner is removed, or against the gaoler or keeper of the common gaol of the county, by reason or in consequence of such prisoner having been taken out of the jurisdiction of such county of a city or town, county, riding or division, from the gaol or house of correction of which such prisoner is removed, into any other jurisdiction, or out of such county to the common gaol of which he is removed into or through any other county or division of a county.

Sect. 23. All the provisions of 51 Geo. 3, c. 100, applicable to convictions in pursuance of the provisions of 38 Geo. 3, c. 52, and to the execution of the sentences passed upon any convicts on such convictions, and all the provisions of the said acts respectively concerning the payment of expenses, shall be applicable in all cases of persons who may be tried in or removed for trial to any adjoining county in pursuance of the provisions of this act, in like manner as in cases of persons tried in or removed for trial to any adjoining county in pursuance of 38 Geo. 3, c. 52.

Sect. 24. For the purposes of this act the counties named in the second column of schedule (C.) to 5 & 6 Will. 4, c. 76, shall be considered next adjoining the counties of cities and towns corporate in the first column of the same schedule in conjunction with which they are respectively named (a).

5. *Appointment and removal of officers, and their remuneration.*

14 & 15 Vict. c. 55.

The provisions of 38 Geo. 3, c. 52, and 51 Geo. 3, c. 100, as to execution of sentences, and as to costs, extended to this act.

What to be deemed the next adjoining county.

V. Appointment and Removal of Officers and their Remuneration (b).

The gaol itself is the Queen's, *ante*, p. 864, but the keeping thereof is incidental to the office of the sheriff, and inseparable from it, except such gaols whereof any persons have the keeping by inheritance or succession; therefore the Queen's grant to private persons, to have the custody of prisoners committed by justices of the peace is void. (*Andr.* 345, 4 Co. 34 a, 9 Co. 119.) This will be found from the 19 Hen. 7, c. 10, which enacts, that every sheriff, within every county within this realm of England, have the custody, rule, keeping, and charge of every the King's common gaols, prisons, and prisoners in the same, in every of the said counties where he is sheriff, during the time of his office, except all gaols whereof any person or persons, spiritual or temporal, or body corporate, have the keeping, of estate of inheritance or by succession. (And see 2 *Inst.* 589.)

Who to have the keeping of gaols.

But by stat. 3 Geo. 1, c. 15, s. 10, none shall buy the office of gaoler, on pain of 500*l.*; half to the Queen, and half to him that shall sue. (See "*Office.*")

Buying office of gaoler.

When a sheriff quits his office, the custody of the county gaol can only belong to his successor. (*The case of the sheriff of Essex*, 1 *Ld. Raym.* 136.)

Sheriff quitting office.

The gaoler of a prison who receives and detains one apprehended and charged in his custody, under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting *bond fide* and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action of trespass and false imprisonment, if, by the mistake of the officer to whom it

Liability of keeper for receiving a person wrongfully taken.

(a) 5 & 6 Will. 4, c. 76, Schedule (C) above referred to, is as follows:
 Berwick-upon-Tweed } Northumberland.
 Bristol } Gloucestershire.
 Chester } Cheshire.
 Exeter } Devonshire.

Kingston-upon-Hull } Yorkshire.
 Newcastle-upon-Tyne } Northumberland.

(b) See also duties of officers, *post*, p. 887; and as to compensation to officers of discontinued prisons, *post*, p. 906.

5. Appointment was directed, it was executed against another. (*Aaron v. Alexander*, and removal of 3 *Camp.* 35; and see *Taylor v. White*, 4 *Esp.* 80.)

officers, and
their remuneration.

Entitled to protection of 24
Geo. 2, c. 41.

Threatening or
assaulting, &c.
gaolers.

Escape.

Taking prisoner
out of country
without a habeas.

Misconduct of
gaolers punishable
at common
law.

Officers of prison
—gaoler, chaplain,
surgeon, matron,
and inferior
officers.

A gaoler receiving and detaining a person under a warrant of a magistrate, is entitled to the protection of the 24 Geo. 2, c. 44, and therefore, on producing and proving the warrant under which the detention was made, it is immaterial whether or not the magistrate had jurisdiction to grant it. (*Butt v. Newman*, *Gow. Rep.* 97; and see that act and the decisions under title “Constable.”)

A gaoler is considered as an officer relating to the administration of justice, and is so far under the protection of the law, that if a person threatens him for keeping a prisoner in safe custody, he may be indicted, and fined, and imprisoned for it. (2 *Roll. Ab.* 76; *Bac. Ab. Gaol* (D).)

If a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed in the affray. (*Hawk. c.* 28, s. 13; *Bac. Ab. Gaol* (D).)

But if a prisoner gets out of gaol, and the gaoler, in pursuit of him, kills him, he is guilty of an escape, though he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had from the attainder of the prisoner by the forfeiture of his goods, &c., but also because the public justice is not so well satisfied by killing him in such an extra-judicial manner. (*Bac. Ab. Gaol* (D). See further, “*Escape*.”)

As to the gaoler being liable to action for false imprisonment for taking a prisoner out of his jurisdiction, without a *habeas corpus* or judge's order, see *Bint v. Lavender*, 1 *C. & P.* 659.

Besides the duties enjoined gaolers by acts of Parliament, and the abuses for which by statute they are punishable, the common law subjects them to fine and imprisonment, as also to the forfeiture of their office for gross and palpable abuses in the execution of their offices; such as suffering prisoners to escape, barbarously misusing them, or detaining them in gaol after they have been legally discharged (9 *Co.* 50; *Raym.* 216; *Co. Litt.* 233); and see, as to when a gaoler would be guilty of murder in improperly treating a prisoner, *post*, “*Homicide*,” as to extortion, see “*Extortion*.”

Also gaolers are punishable by attachment, as all other officers are by the courts to which they more immediately belong, for any gross misbehaviour in their offices or contempts of the rules of such courts; and punishable by any other courts for disobeying writs of *habeas corpus* awarded by such courts, and not bringing up the prisoner at the day prefixed by such writs. (2 *Hawk. P. C. c.* 22, s. 21; *Bac. Ab. Gaols* (D).)

But a gaoler is not punishable by attachment for the bare escape of a prisoner in custody by civil process; but the party aggrieved ought to take his remedy by action. (*Id.*)

A gaoler, *de facto*, is as much punishable for a misdemeanor in his office as if he were a rightful gaoler. (*Hawk. c.* 19, s. 23.)

It was held in *Yorke v. Chapman*, 10 *A. & E.* 207, that the marshal of the Queen's Bench prison was not liable for a tortious act committed by his deputy, in ill-treating a prisoner in the exercise of his office, unless the appointment of the deputy was proved, or the facts showed that the marshal was cognizant of the act done.

By 28 & 29 Vict. c. 126, s. 10, there shall be appointed to every prison by the justices in sessions assembled,

A gaoler; a chaplain, being a clergyman of the Established Church; a surgeon, duly registered as such, under the 21 & 22 Vict. c. 90; and such subordinate officers as may be necessary.

And to every prison in which females are confined,

A matron, and such subordinate female officers as may be necessary.

Provided, that in a prison where females only are imprisoned the matron shall be deemed to be the gaoler, and shall, so far as is practi-

cable, perform all the duties and be subject to all the obligations of a gaoler in relation to such prison.

Sect. 11. The same person may officiate as chaplain of any 2 prisons situate within a convenient distance from each other, if such prisons together are calculated to receive not more than 100 prisoners; but the chaplain of more than one prison, and the chaplain of any prison in which the average number of prisoners confined at any one time during the 3 years next before his appointment has not been less than 100, shall not, whilst holding his chaplaincy, hold any benefice with cure of souls or any curacy.

Sect. 12. The justices in sessions assembled may appoint an assistant chaplain, being a clergyman of the Established Church, and a deputy gaoler, or either of such officers, to any prison which they deem sufficiently large to require the appointment of such officers or either of them.

Sect. 13. Notice of the nomination of a chaplain or assistant chaplain to a prison shall, within one month after it has taken place, be transmitted to the bishop of the diocese in which the prison is situate, and no chaplain or assistant chaplain shall officiate in any prison until he has obtained a licence for that purpose from the bishop of the diocese wherein the prison is situate, nor for any longer time than while such licence continues in force.

Sect. 14. Every officer of a prison appointed under this act shall hold his office during the pleasure of the justices in sessions assembled, and shall receive such salary as they may direct, subject to this proviso, that in the case of a municipal borough the amount of the salary of every prison officer appointed under this act shall be approved by the council.

Sect. 15. If any officer of a prison has been an officer of such prison for not less than 20 years, and is not less than 60 years of age, or becomes incapable, from confirmed sickness, age, infirmity, or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity, or injury is certified by a medical certificate, and there shall be a report of the visiting justices testifying to his good conduct during his period of service, and recommending a grant to be made to him (such report to be made at some sessions of the justices holden not less than 2 months before the sessions at which the grant is made), the justices in sessions assembled may grant to such officer, having regard to his length of service, an annuity, by way of superannuation allowance, not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year; any annuity or gratuity so fixed to be payable out of the rates lawfully applicable to the payment of the salaries of such officers. Where the power to levy the last-mentioned rates is vested in a different body from the justices, the consent of such last-mentioned body shall be obtained to the amount of superannuation allowed.

Sect. 16. Whenever any officer of a prison is suspended, removed from, or resigns his office, or departs this life, the officer so suspended, removed, or resigning, and his family, and the family of every such deceased officer, shall quit the possession of the house or apartments in which he or they have previously resided by virtue of such office when required so to do by notice under the hand or hands of 2 or more visiting justice or justices of the peace; and if he or they refuse or neglect to give such possession for 48 hours after such notice as aforesaid has been given to him or them, any two justices, upon proof made to them of such removal, resignation, or death, and of the service of such notice, and of such neglect or refusal to comply therewith, may, by warrant under their hands and seals, direct any constable, within a period therein named, to enter by force, if necessary, into

5. *Appointment and removal of officers, and their remuneration.*

28 & 29 Vict. c. 126.
Appointment of chaplain to two prisons.

Assistant chaplains and deputy gaoler.

Notice to be sent to bishop as to chaplains and assistant chaplains.

Tenure of office and salaries of prison officers.

Superannuation of officers.

Removal of prison officers from apartments.

6. *Discipline of such premises, and deliver possession thereof to the prison authority, prisoners and or to any person appointed by the visiting justices. government of prisons.*

28 & 29 Vict. c. 126.

Requisitions of act as to separation of prisoners.

VI. Discipline of Prisoners and Government of Prisons.

Sect. 17. The requisitions of this act with respect to the separation of prisoners are as follows :

1. In every prison separate cells shall be provided equal in number to the average of the greatest number of prisoners, not being convicts under sentence of penal servitude, who have been confined in such prison at any time during each of the preceding 5 years :
2. In every prison punishment cells shall be provided or appropriated for the confinement of prisoners for prison offences :
3. In a prison containing female prisoners as well as males, the women shall be imprisoned in separate buildings or separate parts of the same buildings, in such manner as to prevent their seeing, conversing, or holding any intercourse with the men :
4. In a prison where debtors are confined, means shall be provided for separating them altogether from the criminal prisoners :
5. In a prison where criminal prisoners are confined, such prisoners shall be prevented from holding any communication with each other, either by every prisoner being kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or by every prisoner being confined by night to his cell, and being subjected to such superintendence during the day as will, consistently with the provisions of this act, prevent his communicating with any other prisoner.

Cells to be certified for confinement of prisoners.

Sect. 18. No cell shall be used for the separate confinement of a prisoner unless it is certified by one of her Majesty's inspectors of prisons to be of such a size, and to be lighted, warmed, ventilated, and fitted up in such a manner, as may be requisite for health, and furnished with the means of enabling the prisoner to communicate at any time with an officer of the prison ; but a distinction may be made in respect of the use of cells for the separate confinement of prisoners during long and short periods of imprisonment, and in respect of the use of cells in which the prisoner is intended to be employed during the whole day, or for a long or short part thereof ; and the certificates of the inspector may be varied accordingly, so as to express the period of imprisonment for which each cell may be considered fit, and the number of hours in the day during which the prisoners may be employed therein (a).

No punishment cell shall be used unless it is certified by such inspector that it is furnished with the means of enabling the prisoner to communicate at any time with an officer of the prison, and that it can be used as a punishment cell without detriment to the prisoner's health, and the time for which it may be so used shall be stated in the certificate.

Every certified cell shall be distinguished by a number or mark placed in a conspicuous position, and shall be referred to by its number or mark in the certificate of the inspector, and if the number or mark of any certified cell is changed without the consent of the

(a) By s. 75 all cells certified before the commencement of this act by any inspector of prisons as being fit to be used for the separate con-

finement of prisoners shall be deemed to be cells certified for such purpose under this act.

inspector, such cell shall be deemed to be an uncertified cell until a fresh certificate has been given.

Any certificate given by an inspector in respect of a cell may be withdrawn on such alteration taking place in such cell as to render the certificate, in his opinion, inapplicable thereto, and upon a certificate in respect of a cell being withdrawn that cell shall cease to be a certified cell for the purposes of this act.

If any prison authority feel aggrieved by the refusal of the inspector to certify a cell for any of the purposes of this act, it may appeal to one of her Majesty's principal secretaries of state, and his decision shall be final.

Sect. 19. Hard labour for the purposes of this act shall be of two classes, consisting, 1st, of work at the tread-wheel, shot drill, crank, capstan, stone-breaking, or such other like description of hard bodily labour as may be appointed by the justices in sessions assembled, with the approval of the secretary of state, which work is hereinafter referred to as hard labour of the first class; 2dly, of such other description of bodily labour as may be appointed by the justices in sessions assembled, with the approval of the secretary of state, which work is hereinafter referred to as hard labour of the second class; and in every prison where prisoners sentenced to hard labour are confined, adequate means (having regard to the average number of such prisoners confined in that prison during the preceding 5 years) shall be provided for enforcing hard labour in accordance with the regulations of this act; and no prison shall be deemed to be in conformity with the requisitions of this act with respect to the enforcement of hard labour unless such means as aforesaid have been provided therein, and prisoners sentenced to hard labour have been employed thereat in manner provided by this act: provided, that employment in the necessary services of the prison may, in the case of a limited number of prisoners, to be selected by the visiting justices, as a reward for industry and good behaviour, be deemed to be hard labour of the second class.

Sect. 20. The regulations contained in the 1st schedule hereto with respect to the government of prisons shall be binding on all persons in the same manner as if they were enacted in the body of this act.

Sect. 21. The justices in sessions assembled shall make rules for the supply to all prisoners confined in prisons within their jurisdiction of a sufficient quantity of plain and wholesome food, regard being had, so far as relates to convicted criminal prisoners, to the nature of the labour required from or performed by such prisoners, so that the allowance of food may be duly apportioned thereto, and shall frame dietary tables for this purpose, and the said justices may make rules in respect of any other matters relating to the government of prisons within their jurisdiction, in addition to the regulations in the said first schedule, and may from time to time repeal or alter any rules made or dietary tables framed in pursuance of this section; but no rule or dietary table, or repeal or alteration of a rule or dietary table, shall be valid under this section until one of her Majesty's principal secretaries of state has certified his approval in writing under his hand; and when such approval has been certified, such rule or dietary table, or repeal or alteration of a rule or dietary table, shall be binding on all persons in the same manner as if it were enacted by this act. If the justices in sessions assembled make default in making rules and dietary tables that may be approved by the said secretary of state in respect of the supply of food to prisoners in any prison within their jurisdiction, there shall be in force in such prison such rules or dietary tables with respect to such supply as may from time to time be determined by the said secretary of state in writing under his hand.

Sect. 22. Upon visiting or inspecting a prison to which this act applies, the inspector shall, by letter addressed to the visiting justices, call their attention to any irregularity he may have observed therein,

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Requisitions of act as to hard labour.

Regulations as to government of prisons.

Justices may make rules as to dietary and other matters relating to the government of the prisons within their jurisdiction.

Inspector of prisons to leave a minute of observations.

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SCHEDULE I.—REGULATIONS FOR GOVERNMENT OF PRISONS.

Schedule.

General.

Cleanliness in prison.

1. The prison shall be kept in a cleanly state, and the walls and ceilings of the wards, cells, rooms, and passages used by the prisoners throughout every prison shall either be painted with oil, or be lime-washed, or partly painted and partly limewashed. Where painted with oil the painting shall be washed with hot water and soap once at least in every six months. Where limewashed the limewashing shall be renewed once at least in every year. The day rooms, work rooms, passages, and sleeping cells shall be washed or cleansed once a week, or oftener if requisite.

Trees, &c. not allowed against walls.

2. No thing shall be allowed to grow against the outer walls of the prison, nor any rubbish or other articles to be laid against them, nor shall any tools or implements of any kind likely to facilitate escape be left unnecessarily exposed.

Temperature of prison.

3. Thermometers shall be placed in different parts of the prison.

Visitors not to sleep within the prison.

4. No person shall be permitted to sleep in the apartments of any subordinate officer of the prison without permission from the gaoler, such permission to be reported to a visiting justice.

Hours of locking and unlocking the prison.

5. A report shall be made to the gaoler at 10 o'clock each night whether the officers resident in the prison are all present; and no ingress or egress shall be allowed into or out of the prison between the hours of 10 o'clock at night and 6 o'clock in the morning, except to the gaoler and his family, the chaplain, or surgeon, or in special cases, which shall be entered in the journal of the gaoler.

Admission and Discharge of Prisoners.

Search of prisoners on admission.

6. Prisoners on admission shall be searched, and all dangerous weapons, articles calculated to facilitate escape, and prohibited articles, shall be taken from them.

Prisoner to be alone when searched.

7. No prisoner shall be searched, in the presence of any other prisoner.

Effects retained by gaoler.

8. All money or other effects brought into the prison by any prisoner, or sent to the prison for his use, which he is not allowed to retain, shall be placed in the custody of the gaoler, who shall keep an inventory of them in a separate book.

Register of certain particulars relating to prisoner.

9. The name, age, height, weight, features, particular marks, and general appearance of a criminal prisoner shall, upon his admission, be noted in a nominal record of prisoners, to be kept by the gaoler. Every criminal prisoner shall also, as soon as possible, be examined by the surgeon, who shall enter in a book to be kept by the gaoler a record of the state of health of the prisoner, and any observations he may deem it expedient to add.

Removal and discharge of prisoners.

10. All prisoners, previously to being removed to any other prison or being discharged from prison, shall be examined by the surgeon; and no prisoner shall be removed to any other prison unless the surgeon certifies, by an entry in the nominal record, that the prisoner is free from any illness that renders him unfit for removal; and no prisoner shall be discharged from prison if labouring under any acute or dangerous distemper, nor until, in the opinion of the surgeon, such discharge is safe, unless such prisoner require to be discharged.

Separation of prisoners.

11. Prisoners before trial shall be kept apart from convicted prisoners.

Female prisoners.

12. Female prisoners shall be searched on admission by female officers. In other respects the same course shall be pursued in reference to the admission, removal, or discharge of a female prisoner

as in the case of a male prisoner, the matron performing the duties imposed on the gaoler in case of a male prisoner.

Food, Clothing, and Bedding of Prisoners.

13. No tap shall be kept in any prison ; nor shall spirituous liquors of any kind be admitted for the use of any of the prisoners therein, under any pretence whatever, unless by a written order of the surgeon, specifying the quantity to be admitted, and the name of the prisoner for whose use it is intended ; but this regulation shall not apply to any stock of spirituous liquors kept in the prison for the use of the infirmary, and under the control of the surgeon.

14. No smoking shall be allowed, or tobacco introduced, except with the consent and subject to the rules made by the visiting justices, or under a written order of the surgeon.

15. Any order by the surgeon for the admission of spirituous liquors or tobacco shall be entered by him in his journal.

16. A debtor shall be permitted to maintain himself, and to procure or receive at proper hours food, wine, malt liquor, clothing, bedding, or other necessaries, but subject to examination, and to such rules as may be approved by the visiting justices.

17. No part of any food, wine, malt liquor, clothing, bedding, or other necessaries belonging to any debtor shall be sold to any other prisoner ; and any debtor transgressing this regulation shall lose the privilege of receiving or purchasing any wine or malt liquor for such a time as the visiting justices may deem proper.

18. A debtor, if unable to provide himself with sufficient food, clothing, bedding, or other necessaries, shall receive the allowance of food, clothing, bedding, or other necessaries allotted to debtors unable to maintain themselves by the prison rules for the time being in force.

19. A criminal prisoner before trial may procure for himself, or receive at proper hours, food, and malt liquor, clothing, bedding, or other necessaries, subject to examination, and to such rules as may be approved by the visiting justices ; and any articles so procured may be paid for out of the monies belonging to such prisoner in the hands of the gaoler. No part of such food, malt liquor, bedding, clothing, or other necessaries shall be sold or transferred to any other prisoner ; and any prisoner transgressing this regulation shall be prohibited from procuring any food or other necessaries for such time as the visiting justices may deem proper. If a criminal prisoner before trial does not provide himself with food, he shall receive the allowance of food allotted to criminal prisoners before trial by the rules of the prison.

20. Criminal prisoners before trial may, if they desire it, wear the prison dress, and they shall be required to do so if their own clothes are insufficient or unfit for use, or necessary to be preserved for the purposes of justice. The prison dress for prisoners before trial shall be of a different colour from that of convicted prisoners.

21. Every convicted criminal prisoner shall be allowed a sufficient quantity of food according to the scale established by the rules of the prison. Prisoners under the care of the surgeon shall be allowed such diet as he may direct. Care shall be taken that all provisions supplied to the prisoners be of proper quality and weight. Scales and legal weights and measures shall be provided, open to the use of any prisoners, under such restrictions as may be made by the prison rules.

22. No convicted criminal prisoner shall be allowed any wine, beer, or other fermented liquor, except under a written order from the surgeon, to be entered in his journal, specifying the quantity and the name of the prisoner for whose use it is intended, or shall receive any food, clothing, bedding, or necessaries other than the prison allowance, except under special circumstances, to be judged of by one

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Schedule.

Spirituous liquors.

Smoking.

Order of surgeon as to spirituous liquors, &c.

Debtor may maintain himself.

Debtor not to sell provisions.

Prison allowance to debtors.

Prisoner before trial may maintain himself.

Dress of criminal prisoner before trial.

Prison allowance of food for convicted prisoner.

Convicted prisoner restricted to prison allowances.

6. *Discipline of prisoners and government of prisons.* or more of the visiting justices, and to be reported to the prison authority.
23. A convicted criminal prisoner shall be provided with a complete prison dress, and shall be required to wear it.
24. On the discharge of a prisoner his own clothes shall be returned to him unless it has been found necessary to destroy them, in which case he shall be provided with clothing.
25. If necessary the clothes of a prisoner shall be purified before he is allowed to wear them in the prison or to take them on his discharge.
26. Every male prisoner shall sleep in a cell by himself, or under special circumstances in a separate bed placed in a cell containing not fewer than 2 other male prisoners, and sufficient bed clothes shall be provided for every prisoner. A convicted criminal prisoner may be required to sleep on a plank bed without a mattress during such time as may be determined by the rules of the prison. Epileptic prisoners, or prisoners labouring under diseases requiring assistance or supervision in the night, may at any time, notwithstanding this regulation, be placed by order of the surgeon with not fewer than 2 other male prisoners.
27. The bed clothes shall be aired, changed, and washed as often as the surgeon or the visiting justices may direct.
- Personal Cleanliness.*
28. Prisoners shall be required to keep themselves clean and decent in their persons, and to conform to such rules as may be laid down for that purpose.
29. The hair of a female prisoner shall not be cut without her consent, except on account of vermin or dirt, or when the surgeon deems it requisite on the ground of health, and the hair of male criminal prisoners shall not be cut closer than may be necessary for purposes of health and cleanliness.
- Employment of Prisoners.*
30. No gaming shall be permitted in any prison, and the gaoler shall seize and destroy all dice, cards, or other instruments of gaming.
31. Debtors may be permitted to work and follow their respective trades and professions, provided their employment does not interfere with the regulations of the prison; and such debtors as find their own implements, and are not maintained at the expense of the prison, shall be allowed to receive the whole of their earnings; but the earnings of such as are furnished with implements, or are maintained at the expense of the prison, shall be subject to a deduction, to be determined by the visiting justices, for the use of implements and the costs of maintenance.
32. Criminal prisoners before trial shall have the option of employment, but shall not be compelled to perform any hard labour.
33. On the acquittal of any criminal prisoner, or when no bill of indictment is found against him, such an allowance on account of his earnings, if any, shall be paid to such prisoner on his discharge as the visiting justices may think reasonable.
34. Every male prisoner of 16 years of age and upwards, sentenced to hard labour, shall, during the whole of his sentence where it does not exceed 3 months, and during the first 3 months of his sentence where it exceeds 3 months, be kept at hard labour of the first class for such number of hours not more than 10 or less than 6 (exclusive of meals) as may be prescribed by the visiting justices, and during the remainder of his sentence shall be kept in like manner at hard labour of the first class, except where during such remainder of his sentence the visiting justices substitute hard labour of the second class for hard labour of the first class; provided that if the surgeon certifies any

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Schedule.

Dress of convicted criminal.

Return of clothing to discharged prisoner.

Purification of clothing of prisoner.

Beds.

Bedding.

Personal cleanliness of prisoners.

Hair-cutting.

Prohibition of gaming.

Work and earnings of debtors.

Employment of criminal prisoners before trial.

Allowance out of earnings to acquitted prisoners.

Regulations as to hard labour of the first class.

such prisoner to be unfit to be kept at hard labour of the first class during the whole or any part of the prescribed hours, such prisoner shall, during such whole or part of the prescribed hours, be kept at hard labour of the second class, unless the surgeon certifies that such prisoner is unfit to be kept at either class of hard labour during the whole or any part of such hours; provided that prisoners sentenced to hard labour for periods not exceeding 14 days may, in pursuance of rules made by the justices in sessions, be kept in separate confinement at hard labour of the second class during the whole period of their sentences.

35. Every male prisoner under the age of 16 years sentenced to hard labour, and every female prisoner sentenced to hard labour, shall be kept at hard labour of the second class during such number of hours not more than 10 or less than 6 (exclusive of meals) in each day as may be prescribed by the visiting justices, unless the surgeon certifies that he or she is unfit for hard labour.

36. No prisoner shall be employed at hard labour on Sundays, Christmas Day, Good Friday, and days appointed for public fasts or thanksgivings.

37. The surgeon shall from time to time examine the prisoners sentenced to hard labour during the time of their being so employed, and shall enter in his journal the name of any prisoner whose health he thinks to be endangered by a continuance at hard labour of either class, and thereupon such prisoner shall not again be employed at such class of hard labour until the surgeon certifies that he is fit for such employment.

38. Provision shall be made by the visiting justices for the employment of all convicted criminal prisoners not sentenced to hard labour. The visiting justices shall make rules as to the amount and nature of such employment, but no prisoner not sentenced to hard labour shall be punished for neglect of work, excepting by such alteration in the scale of diet as may be established by the rules of the prison in the case of neglect of work by such prisoners.

Health of Prisoners.

39. Debtors shall have the means of daily taking exercise in the open air.

40. Criminal prisoners, if employed at work in their own cells, shall be permitted to take such exercise in the open air as the surgeon may deem necessary for their health.

41. The names of the prisoners who desire to see the surgeon, or appear out of health, shall be reported by the officer attending them to the gaoler, and by him without delay to the surgeon.

42. All directions given by the surgeon in relation to any prisoner, with the exception of orders for the supply of medicines or directions in relation to such matters as are carried into effect by the surgeon himself or under his superintendence, shall be entered day by day in his journal, which shall have a separate column in which entries are to be made by the gaoler, stating in respect of each direction the fact of its having been or not having been complied with, accompanied by such observations, if any, as the gaoler may think fit to make, and the date of the entry.

43. In every prison an infirmary or proper place for the reception of sick prisoners shall be provided.

Religious Instruction.

44. In every prison where there is no chapel a suitable room shall be set apart for the purposes of the chapel (a).

45. Prayers to be selected by the chaplain from the Liturgy of the

6. *Discipline of prisoners and government of prisons.*

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Schedule.

Regulations as to hard labour of the second class.

Days of exemption from hard labour.

Examination by surgeon of prisoners at hard labour.

Employment of prisoners not sentenced to hard labour.

Exercise of debtors.

Of prisoners in separate confinement.

When prisoners to be reported to surgeon.

Entry of directions by surgeon.

Infirmaries.

Room for use as chapel.

Prayers.

(a) See 26 & 27 Vict. c. 79, s. 3, *post*, p. 884.

6. *Discipline of prisoners and government of prisons.* Established Church shall be read daily by the chaplain, gaoler, or such other person as may be appointed by the visiting justices, and at such time or times as may be fixed by them, and portions of the Scriptures shall be read to the prisoners, when assembled for religious instruction, by the chaplain, or by such person, with the consent of the visiting justices, as he may appoint.

28 & 29 Vict. c. 126.

Schedule.

Performance of divine service.

46. The chaplain shall on every Sunday, and on Christmas Day and Good Friday, perform the appointed Morning and Evening Services of the Established Church, and preach at such time or times as shall be fixed by him with the approval of the visiting justices. He shall give religious and moral instruction to the prisoners who are willing to receive it. He shall administer the Holy Sacrament of the Lord's Supper on suitable occasions to such prisoners as shall be desirous, and as he may deem to be in a proper frame of mind to receive the same. He shall frequently visit every room and cell of the prison occupied by prisoners, and shall direct such books to be distributed and read and such lessons to be taught in the prison as he may deem proper for the religious instruction of the prisoners. Criminal prisoners shall attend Divine Service on Sundays, and on other days when such service is performed, unless prevented by illness or other reasonable cause, to be allowed by the gaoler, or unless their attendance is dispensed with by the visiting justices: this regulation shall not apply to any prisoner who is attended or visited by a minister of a church or persuasion differing from the Established Church: and no prisoner shall be compelled to attend any religious service held or performed, or any religious instruction given, by the chaplain, minister, or religious instructor of a church or persuasion to which the prisoner does not belong.

Ministers to visit prisoners under certain restrictions.

47. If any prisoner is of a religious persuasion differing from that of the Established Church, and no minister has been appointed to attend at the prison on the prisoners of that persuasion, the visiting justices shall permit a minister of such persuasion to be approved by them to visit such prisoner at proper and reasonable times, under such restrictions as may be imposed by the visiting justices to guard against the introduction of improper persons and prevent improper communications, unless such prisoner expressly objects to see such minister.

26 & 27 Vict. c. 79.

Power to appoint additional ministers to prisons.

By the 26 & 27 Vict. c. 79 (the "Prison Ministers' Act"), s. 3, where the number of prisoners confined in any prison to which this act applies, and belonging to some church or religious persuasion differing, if in England, from the Church of England, and if in Scotland, from the Church of Scotland, is so great as, in the opinion of the justices, county board, or other persons having the appointment of chaplain in the said prison, to require the ministrations of a minister of their own church or persuasion, the said justices, county board, or other persons may appoint a minister of such last-mentioned church or persuasion to attend at the said prison on the prisoners of his own church or persuasion, and they may, if they think fit, award to him a reasonable sum as a recompense for his services, such sum to be deemed a part of the expenses of the prison to which he is appointed, and to be paid out of the funds legally applicable to the payment of such expenses.

Regulation as to admission of ministers.

The visiting justices of any prison may, if they think fit, without a special request being made by, but not against the will of, any prisoner of a church or religious persuasion differing from that of the Established Church, permit a minister of the church or persuasion to which such prisoner belongs (if no appointment of such a minister has been made under this act) to visit such prisoner at proper and reasonable times, under such restrictions imposed by them as may guard against the introduction of improper persons, and may prevent improper communications; provided that any prisoner shall, on request, be allowed, subject to the rules of the gaol, to attend the chapel or to be visited by the chaplain of the gaol. Every minister appointed or permitted

to visit prisoners under this act shall hold his appointment or permission to visit during the pleasure of the authority by whom he was appointed or permitted to visit, and shall conform in all respects to the regulations of the prison at which he attends. No minister shall be appointed under this act for any prison in which there is not a chaplain of the Established Church (a).

6. *Discipline of prisoners and government of prisons.*

26 & 27 Vict. c. 79.

Sect. 4. The keeper or other person performing the duties of keeper of a prison on receiving into his custody any prisoner shall enter his name in a book to be provided for the purpose, with the addition of the church or religious persuasion to which the prisoner shall declare himself to belong, and the said keeper or other person shall from time to time give to any minister appointed or permitted to visit prisoners in the prison a list of the prisoners so declared to belong to the church or persuasion of such minister, and no such minister shall be permitted to attend or visit any prisoner belonging to any religious persuasion differing from that to which such minister belongs.

Keepers of prisons to register religion of prisoners.

48. No books or printed papers shall be admitted into any prison for the use of the prisoners, except by permission of the visiting justices; and no books or printed papers intended for the religious instruction of prisoners belonging to the Established Church shall be admitted but those chosen by the chaplain; provided that in case there may be a difference of opinion between the chaplain and visiting justices with respect to books or papers proposed to be admitted for the religious instruction of a prisoner belonging to the Established Church, reference shall be had to the bishop of the diocese, whose decision shall be final; and, subject to such permission of the visiting justices as aforesaid, all books or printed papers admitted into any prison for the religious instruction of prisoners belonging to any other persuasion, and who are visited by a minister of such persuasion, shall be approved by such minister; and the gaoler shall keep a catalogue of all books and printed papers admitted into the prison.

28 & 29 Vict. c. 126.

Schedule.

Books and printed papers.

49. The chaplain shall communicate to the gaoler any abuse or impropriety in the prison which may come to his knowledge, and shall enter the same in his journal.

Chaplain to communicate abuses to gaoler.

50. Where an assistant chaplain is appointed to a prison, he shall be competent to perform any duty required by law to be performed by the chaplain, and when either of them, the chaplain or assistant chaplain, is absent from the prison, the other shall take his duties. Where there is no assistant chaplain, or in case of the services of the assistant chaplain not being available by reason of sickness or other unavoidable cause, the chaplain shall, when absent from the prison on leave or from any unavoidable cause, appoint, with the consent of the visiting justices, a substitute, and insert his name and residence in his journal. In the event of any sudden cause preventing the chaplain, or, in the absence of the chaplain, the assistant chaplain, from performing his duties, he may accept the assistance of a clergyman of the Established Church in the performance of Divine Service in the chapel, inserting the fact, and the name of such clergyman, in his journal.

Assistant chaplain and chaplain's substitute.

51. A minister appointed under the "Prison Ministers' Act, 1863" (26 & 27 Vict. c. 79), may, when absent on leave, or from any unavoidable cause, appoint a substitute with the consent of the visiting justices.

Substitute for prison minister.

52. In the event of the death of any chaplain or assistant chaplain of a prison, or of a minister appointed under the "Prison Ministers' Act, 1863," the visiting justices shall provide a substitute until the next meeting of the justices in sessions.

Substitute on death of chaplain or minister.

(a) These provisions are not inconsistent with the act 28 & 29 Vict. c. 126, and are therefore still in force.

6. *Discipline of prisoners and government of prisons.*

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Schedule.

Instruction of prisoners.

Communication with prisoners.

Power of gaoler as to visitors.

General regulation as to punishment.

Gaoler to punish for prison offences.

Punishment of prisoners by visiting justices.

Instruction.

53. Provision shall be made in every prison for the instruction of prisoners in reading, writing, and arithmetic during such hours and to such extent as to the visiting justices may seem expedient, provided that such hours shall not be deducted from the hours prescribed for hard labour.

Visits to and Communications with Prisoners.

54. Due provision shall be made for the admission, at proper times and under proper restrictions, of persons with whom prisoners before trial may desire to communicate, care being taken that, so far as is consistent with the interests of justice, such prisoners shall see their legal advisers alone; such rules also shall be made by the justices in sessions assembled for the admission of the friends of convicted prisoners as they may deem expedient; the justices shall also impose such restrictions upon the communication and correspondence of prisoners with their friends as they judge necessary for the maintenance of good order and discipline in such prison.

55. The gaoler may demand the name and address of any visitor to a prisoner; and when he has any ground for suspicion may search or cause to be searched male visitors, and may direct the matron or some other female officer to search female visitors, such search not to be in the presence of any prisoner or of another visitor; and in case of any visitor refusing to be searched, the gaoler may deny him or her admission; the grounds of such proceeding, with the particulars thereof, to be entered in his journal.

Prison Offences.

56. No punishments or privations of any kind shall be awarded, except by the gaoler, or by a visiting or other justice.

57. The gaoler shall have power to hear complaints respecting any of the offences following; that is to say,

1. Disobedience of the regulations of the prison by any prisoner;
2. Common assaults by one prisoner on another;
3. Profane cursing and swearing by any prisoner;
4. Indecent behaviour by any prisoner;
5. Irreverent behaviour at chapel by any prisoner;
6. Insulting or threatening language by any prisoner to any officer or prisoner;
7. Absence from chapel without leave by any criminal prisoner;
8. Idleness or negligence at work by any convicted criminal prisoner;
9. Wilful mismanagement of work by any convicted criminal prisoner.

All the above acts are declared to be offences against prison discipline; and it shall be lawful for the gaoler to examine any person touching such offences, and to determine thereupon, and to punish such offences by ordering any offender, for any time not exceeding 3 days, to close confinement, to be kept there upon bread and water. And the gaoler shall enter in a separate book called the punishment book a statement of the nature of any offence that he has punished in pursuance of this regulation, with the addition of the name of the offender, the date of the offence, and the amount of punishment inflicted.

58. If any criminal prisoner is guilty of repeated offences against prison discipline, or is guilty of any offence against prison discipline, which the gaoler is not by this act empowered to punish, the gaoler shall report the same to the visiting justices, or one of them; and any one of such justices, or any other justice having jurisdiction in the place to which the prison belongs, shall have power to inquire

upon oath and to determine concerning any matter so reported to him, and to order the offender to be punished by confinement in a punishment cell for any term not exceeding 1 month, or, in the case of prisoners convicted of felony or sentenced to hard labour, by personal correction.

59. No prisoner shall be put in irons or under mechanical restraint by the gaoler of any prison, except in case of urgent necessity; and the particulars of every such case shall be forthwith entered in the gaoler's journal, and notice forthwith given thereof to one of the visiting justices; and no prisoner shall be kept in irons or under mechanical restraint for more than 24 hours without an order in writing from a visiting justice, specifying the cause thereof, and the time during which the prisoner is to be kept in irons or under mechanical restraint, which order shall be preserved by the gaoler as his warrant.

60. All corporal punishments within the prison shall be attended by the gaoler and the surgeon. The surgeon shall give such orders for preventing injury to health as he may deem necessary, and it shall be the duty of the gaoler to carry them into effect, and the gaoler shall enter in the punishment book the hour at which the punishment is inflicted, the number of lashes, and any orders which the surgeon may have given on the occasion.

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Schedule.

Use of irons.

Corporal punishments.

Prisoners under Sentence of Death.

61. Every prisoner under warrant or order for execution shall, immediately on his arrival in the prison after sentence, be searched by or by the orders of the gaoler, and all articles shall be taken from him which the gaoler deems dangerous or inexpedient to leave in his possession. He shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the constant charge of an officer. He shall be allowed such a dietary and amount of exercise as the gaoler, with the approval of the visiting justices, may direct. The chaplain shall have free access to every such prisoner, unless the prisoner be of a religious persuasion differing from that of the Established Church, and be visited by a minister of such persuasion, in which case the minister of such persuasion shall have free access to him. With the above exceptions, no person, not being a visiting justice or an officer of the prison, shall have access to the prisoner except in pursuance of an order from a visiting justice.

Prisoners under sentence of death.

During the preparation for an execution, and the time of the execution, no person shall enter the prison who is not legally entitled to do so, unless in pursuance of an order in writing from 2 or more visiting justices.

Prison Officers.

62. No prisoner shall be employed as turnkey, assistant turnkey, wardman, yardsman, overseer, monitor, or schoolmaster, or in the discipline of the prison, or in the service of any officer thereof, or in the service or instruction of any other prisoner. But this regulation shall not be taken to prevent the employment of any debtor in that part of the prison in which he may be lawfully confined in any manner in which he may be willing to be employed, and which is consistent with his safe custody.

Regulation as to employment of prisoners in prison offices.

63. Every prison officer, while acting as such, shall, by virtue of his appointment, and without being sworn in before any justice, be deemed to be a constable, and to have all such powers, authorities, protection, and privileges for the purpose of the execution of his duty as a prison officer as any constable duly appointed has within his constablewick by common law, statute, or custom.

Prison officers to be constables.

64. No officer of a prison shall sell or let to, nor shall any person in

Officers not to sell or let to prisoners.

6. *Discipline of prisoners and government of prisons.* trust for or employed by him sell or let to, or derive any benefit from the selling or letting of any article to any prisoner.

28 & 29 Vict. c. 126.

Schedule.
Officers not to contract with prisoners.

Officers not to take gratuities.
Females to be attended by female officers.

65. No officer of a prison shall, nor shall any person in trust for or employed by him, have any interest, direct or indirect, in any contract for the supply of the prison.

66. No officer of a prison shall at any time receive money, fee, or gratuity of any kind for the admission of any visitors to the prison or to prisoners, or from or on behalf of any prisoner, on any pretext whatever.

67. Female prisoners shall in all cases be attended by female officers.

Gaoler.

Residence of gaoler.

68. The gaoler shall reside in the prison. He shall not be an under sheriff or bailiff, or be concerned in any other employment.

Gaoler to conform to law and regulations of prison.

69. The gaoler shall strictly conform to the law relating to prisons and to the prison regulations, and shall be responsible for the due observance of them by others. He shall observe the conduct of the prison officers, and enforce on each of them the due execution of his duties, and shall not permit any subordinate officer to be employed in any private capacity, either for any other officer of the prison, or for any prisoner.

May suspend subordinate officers.

70. The gaoler shall, in case of misconduct, have power to suspend any subordinate officer, and shall report the particulars without delay to a visiting justice.

To inspect the prison daily.

71. The gaoler shall, as far as practicable, visit the whole of the prison, and see every male prisoner once at least in every twenty-four hours, and in default of such daily visits and inspections he shall state in his journal how far he has omitted them and the cause thereof. He shall, at least once during the week, go through the prison at an uncertain hour of the night, which visit, with the hour and state of the prison at the time, he shall record in his journal. When visiting the females' prison he shall be attended by the matron or some other female officer.

To post up in cells abstract of certain regulations.

72. The gaoler shall cause an abstract to be approved by the secretary of state of the regulations relating to the treatment and conduct of prisoners, with a copy of the prison dietaries (printed in legible characters,) to be posted in each cell, and shall read or cause the same to be read to every prisoner who cannot read within 24 hours after his admission.

To report to surgeon prisoners disordered in mind.

73. The gaoler shall without delay call the attention of the surgeon to any prisoner whose state of mind or body appears to require attention, and shall carry into effect the written directions of the surgeon respecting alterations of the discipline or treatment of any such prisoner.

To notify to chaplain and surgeon prisoners requiring their attention.

74. The gaoler shall notify to the surgeon without delay the illness of any prisoner, and shall deliver to him daily a list of such prisoners as complain of illness, or are removed to the infirmary, or confined to their cells by illness, and he shall daily deliver to the chaplain and surgeon lists of such prisoners as are confined in punishment cells.

To give notice of death of prisoners.

75. Upon the death of a prisoner the gaoler shall give immediate notice thereof to the coroner of the district to which the prison belongs, and to one of the visiting justices, as well as to the nearest relative of the deceased where practicable.

To report to visiting justices insane prisoners.

76. The gaoler shall without delay report to the visiting justices any case of insanity or apparent insanity occurring among the prisoners.

To keep enumerated books and accounts.

77. The gaoler shall keep the following records and accounts:—

1st. The register required by the "Prison Ministers' Act, 1863," to be kept of the church or religious persuasion to which each prisoner belongs.

2nd. A journal in which he shall record all such matters as he is

directed to record therein by this act, and all other occurrences of importance within the prison.

3rd. A nominal record of all prisoners committed to his charge, in such form as may be directed by the visiting justices.

4th. A punishment book for the entry of the punishments inflicted for prison offences.

5th. A visitors' book for the entry of any observations made by visitors to the prison.

6th. A record of articles taken from prisoners.

7th. A record of the employment of prisoners sentenced to hard labour, and the manner in which they have been so employed.

8th. A list of books and documents committed to his care.

9th. An inventory of all the furniture and movable property belonging to the prison.

10th. An account of all prison receipts and disbursements.

78. The gaoler shall be responsible for the safe custody of the journals, registers, books, commitments, and all other documents confided to his care.

6. *Discipline of prisoners and government of prisons.*

28 & 29 Vict. c. 126. Schedule.

To be responsible for safe custody of documents.

79. The gaoler shall not be absent from the prison for a night without permission in writing from a visiting justice; and his leave of absence, with the name of the visiting justice granting it, shall be entered in his journal; but if absent without leave for a night from unavoidable necessity he shall state the fact and the cause of it in his journal.

Not to be absent without leave.

80. Where a deputy gaoler is appointed to a prison, he shall be legally competent to perform any duty required by law to be performed by the gaoler, and when the gaoler is absent from the prison the deputy gaoler shall perform all his duties. Where there is no deputy gaoler, or in case of his services not being available by reason of sickness or other unavoidable cause, the gaoler shall, when absent from the prison on leave, appoint, with the consent of the visiting justices, an officer of the prison to act as his substitute, and during such absence the substitute so appointed shall have all the powers and perform all the duties of the gaoler.

Power of deputy gaoler.

The deputy gaoler when in charge of the prison as gaoler shall, if absent from the prison from any unavoidable cause, or unable from sickness to perform his duties, appoint a substitute, with the sanction of the visiting justices.

Substitute of deputy gaoler.

See 26 & 27 Vict. c. 79, s. 4, (*ante*, p. 885), imposing upon gaolers the duty of keeping a list of prisoners who shall declare themselves to belong to any other church or religious persuasion than the Established Church.

Matron.

81. The matron shall reside in the prison. She shall have the care and superintendence of the whole female department. The wards, cells, and yards where females are confined shall be secured by locks different from those securing the wards, cells, and yards allotted to male prisoners, and the keys of those locks shall be kept in the custody of the matron.

General duties.

82. The matron shall, so far as practicable, visit and inspect every part of the prison occupied by females, and see every female prisoner once at least in every 24 hours, and in default of such daily visits and inspections she shall state in her journal how far she has omitted them, and the cause thereof. She shall, at least once during the week, go through such part of the prison at an uncertain hour of the night, which visit, with the hour and state of such part of the prison at the time, shall be recorded in her journal.

To inspect daily female prison.

83. The matron shall not be absent from the prison for a night without permission in writing from a visiting justice on the recommendation of the gaoler; and her leave of absence, with the name of the visiting justice granting it, shall be entered in her journal; but

Not to be absent without leave.

6. *Discipline of prisoners and government of prisons.* if absent without leave for a night from unavoidable necessity she shall state the fact and the cause of it in her journal.

28 & 29 Vict. c. 126.

Schedule.

To appoint deputy when absent.

To keep journal.

84. The matron shall, with the consent of the gaoler, and with the approval of the visiting justices, appoint a female officer of the prison to act as deputy matron whenever she is absent on leave from the prison, and during such absence the deputy matron shall have all the powers and duties of the matron. Before leaving the prison the matron shall personally give over the charge of the part of the prison occupied by females to the deputy matron.

85. The matron shall keep a journal in which she shall record all occurrences of importance within her department, and punishments of female prisoners, and lay the journal before the gaoler daily, and before the visiting justices at their ordinary meetings.

Surgeon.

When to visit prison.

86. The surgeon shall visit the prison at least twice in every week, and oftener if necessary, and shall see every prisoner in the course of the week. He shall daily visit the prisoners, if any confined in punishment cells, and he shall visit daily, and oftener if necessary, such of the prisoners as are sick, and, when necessary, shall direct any prisoner to be removed to the infirmary.

To make daily record respecting sick prisoners.

87. The surgeon shall enter, in the English language, day by day, in his journal to be kept in the prison, an account of the state of every sick prisoner, the name of his disease, a description of the medicines and diet, and any other treatment which he may order for such prisoner.

Occasionally to inspect every part of prison, &c.

88. The surgeon shall, once at least in every 3 months, inspect every part of the prison, and enter in his journal the result of each inspection, recording therein any observations he may think fit to make on any want of cleanliness, drainage, warmth, or ventilation; any bad quality of the provisions, any insufficiency of clothing or bedding, any deficiency in the quantity or defect in the quality of the water, or any other cause which may affect the health of the prisoners.

To report special cases.

89. Whenever the surgeon has reason to believe that the mind of a prisoner is or is likely to be injuriously affected by the discipline or treatment, he shall report the case in writing to the gaoler, together with such directions as he may think proper, and he shall call the attention of the chaplain to any prisoner who appears to require his special notice.

To call in additional medical aid.

90. The surgeon may, in any case of danger or difficulty which appears to him to require it, call in additional medical assistance; and no serious operation shall be performed without a previous consultation being held with another medical practitioner, except under circumstances not admitting of delay, such circumstances to be recorded in his journal.

To make entries as to death of prisoner.

91. The surgeon shall, forthwith on the death of any prisoner, enter in his journal the following particulars; viz., at what time the deceased was taken ill, when the illness was first communicated to the surgeon, the nature of the disease, when the prisoner died, and an account of the appearances after death (in cases where a post mortem examination is made), together with any special remarks that appear to him to be required.

To appoint substitute when absent.

92. In case of sickness, necessary engagement, or leave of absence, to be given by the visiting justices, the surgeon shall appoint a substitute, approved of by the visiting justices. The name and residence of the substitute shall be entered in his journal.

PRISON OFFICERS.

Officers to obey gaoler.

93. All officers of the prison shall obey the directions of the gaoler, subject to the regulations of this act, and all subordinate officers shall

perform such duties as may be directed by the gaoler, with the sanction of the visiting justices, and the duties of each subordinate officer shall be inserted in a book to be kept by him.

94. Subordinate officers shall not be absent from the prison without leave from the gaoler, and before absenting themselves they shall leave their keys, instruction book, and report book in the gaoler's office.

95. Subordinate officers shall not be permitted to receive any visitors within the prison without permission of the gaoler.

96. All subordinate officers shall frequently examine the state of the cells, bedding, locks, bolts, &c., and shall seize all prohibited articles, and deliver them to the gaoler forthwith.

6. *Discipline of prisoners and government of prisons.*

28 & 29 Vict. c. 126. Schedule.

Not to be absent without leave.

Not to receive visitors without leave.

To examine cells, locks, &c.

Porter.

97. The officer acting as gate porter may examine all articles carried in or out of the prison, and may stop any person suspected of bringing in spirits or other prohibited articles into the prison, or of carrying out any property belonging to the prison, giving immediate notice thereof to the gaoler.

Duties of gate porter.

Reports.

98. Within one week after the termination of every assize or court of quarter sessions the gaoler shall transmit by post to one of her Majesty's principal secretaries of state a calendar containing the names, crimes, and sentences of every prisoner tried at such assize or court of quarter sessions in such form and containing such particulars as may be required by the secretary of state; and whenever such court adjourns for any longer time than one week, the day upon which the adjournment is made shall be deemed the termination of the session within the meaning of this regulation; and every adjourned session for the trial of prisoners shall, for the purposes of this act, be deemed a separate session; and every gaoler who neglects or refuses to transmit such calendar, or wilfully transmits a calendar containing any false or imperfect statement, shall for every such offence forfeit a sum not exceeding 20*l.*, to be recovered summarily.

Gaoler to transmit list of prisoners to secretary of state.

99. The visiting justices shall once at least in each quarter of the year carefully examine the following books kept by the gaoler of every prison, that is to say, the register kept in pursuance of the "Prison Ministers' Act, 1863," the journal, the nominal record, the punishment book, the visitors' book, the record of articles taken from prisoners, the record of the employment of prisoners, the list of books and documents committed to his care, the inventory and the account of prison receipts and disbursements, and shall report to the justices in sessions assembled any special circumstances which call for notice in respect of such books. The gaoler shall also at such sessions answer on oath, if required, the inquiries of the justices with respect to the condition of the prison and of the prisoners, and with respect to any other matters relating thereto. He shall at the same time present a certificate, signed by himself, containing a declaration how far the requisitions of this act with respect to the separation of prisoners and enforcement of hard labour have been complied with, and shall point out any deviation therefrom which has taken place since his last attendance at sessions.

Gaoler to attend sessions, and make report.

100. The journals of the chaplain and surgeon shall, once at least in each quarter of a year, be laid before the justices in sessions assembled at such time as they may appoint, and shall be signed by the chairman of the sessions in proof of the same having been there produced. The chaplain shall once in the year, and he may at any sessions, deliver to the justices in sessions assembled a statement of the condition of the prison to which he is attached, and his observations thereon; and the surgeon shall, once at least in each quarter of a year,

Journals and reports of chaplain and surgeon.

7. Building, enlargement, and rebuilding of prisons.

28 & 29 Vict. c. 126.

Schedule.

Record of visits of chaplain and non-resident officers.

report to the justices in sessions assembled the condition of the prison, and the state of health of the prisoners under his care.

101. There shall be kept in every prison a book, to be called the non-resident officers' book, in which the chaplain and any other officer of the prison not residing within the prison, but attending on or required to attend on such prison, shall regularly enter the date of every visit made to the prison by such officer; and every entry shall be signed with the name and be in the handwriting of such officer, and such book shall, once at least in each quarter of a year, be laid before the justices in sessions assembled at such time as they may appoint, and shall be signed by the chairman of the sessions in proof of the same having been produced. The gaoler of every prison shall be responsible for the safe custody of such book, and shall at all times, when required so to do, produce it for inspection to the visiting justices, or to any justice of the peace for the county, riding, division, hundred, district, city, town, or place to which the prison belongs.

Construction and Application of Schedule.

Rules as to prisoners not debtors or criminals.

Construction of word "Regulation."

Definition of subordinate officers.

102. Subject to the provisions of this act, the justices in sessions assembled shall make such rules as they think expedient with respect to the classification and treatment of prisoners who are not debtors and are not criminal prisoners within the meaning of this act.

103. Any rules made by the justices in sessions assembled, or by the visiting justices, and any dietary tables framed in pursuance of this act, shall be deemed to be regulations of the prison within the meaning of this act.

104. All officers of a prison shall be deemed to be subordinate officers, with the exception of the gaoler, the chaplain, the surgeon, the matron, and any minister appointed under the "Prison Ministers' Act."

VII. Building, Enlargement, and Re-building of Prisons.

28 & 29 Vict. c. 126.

Power to build prisons.

Conditions as to building prisons for boroughs or counties.

Sect. 23. Subject to the conditions hereinafter mentioned, any prison authority may alter, enlarge, or rebuild any of its prisons, or may, if necessary, build other prisons in lieu of or in addition to any subsisting prisons, and may borrow money for the purpose of such alteration, enlargement, new building, or building.

Sect. 24. The necessity for any alteration or enlargement or for rebuilding of an existing prison, or for the building of a new prison, shall be proved, in the case of a municipal borough, by the certificate of the recorder, or chairman of quarter sessions where there is no recorder, and in any other case by a presentment of two or more of the visiting justices or other justices having jurisdiction within the district of the prison authority; and the consideration of such certificate or presentment shall not be entertained by the prison authority (a) unless not less than 3 weeks' previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority of their intention to take the same into consideration at a time and place to be mentioned in such notice, and in every case the sanction of one of her Majesty's secretaries of state must be obtained to any such alteration, enlargement, rebuilding, or building.

Mode of obtaining sanction of secretary of state to building of prisons.

Sect. 25. In order to obtain the sanction of the secretary of state to the alteration, enlargement, or rebuilding of any prison, the prison authority shall forward to him a plan of the proposed alterations, enlargement, or new building, drawn on such scale and accompanied

(a) See s. 5 for definition of prison authority, p. 865.

with such particulars as the said secretary may determine, and shall add thereto an estimate of the expense proposed to be incurred by the prison authority, and the amount of money proposed to be borrowed; and wherever a new prison is built, or an old prison is altered, enlarged, or rebuilt, a chapel or suitable room shall be provided easy of access to the prisoners, and shall be strictly set apart for religious worship, or for the religious and moral instruction of the prisoners, and shall not be employed for any other purpose.

Sect. 26. The said secretary of state may approve of the plans submitted to him with or without modification, or may disapprove of the same, and his approval or disapproval shall be certified in writing under his hand.

Sect. 27. Any monies borrowed by a prison authority may be charged by that authority on any county rate or rate in the nature of a county rate, borough rate, or other rate applicable to the maintenance of a prison and leviable by that authority, or on any other property belonging to that authority and applicable to the same purpose as the said rates, and shall be repaid, together with the interest due thereon, out of such rates or other property.

Sect. 28. The clauses of "The Commissioners' Clauses Act, 1847" (a), with the exception of the 84th clause with respect to mortgages to be created by the commissioners, shall form part of and be incorporated with this act, and any mortgagee or assignee may enforce payment of his principal and interest by appointment of a receiver.

In the construction of the said clauses "the commissioners" shall mean "the prison authority."

Where a prison authority borrows any money for the alteration, enlargement, or rebuilding of any prison, or the building of any new prison, they shall charge the rates or property out of which the monies borrowed are payable not only with the interest of the monies so borrowed, but also with the payment of such further sum as will ensure the repayment of the whole sum borrowed within 30 years, or if the loan has been made by the public works' loan commissioners as defined by the "Public Works' Loan Act, 1853" (b), within 20 years of the time of borrowing the same.

Sect. 29. The said public works' loan commissioners as defined by the "Public Works' Loan Act, 1853" (b), may advance to any prison authority upon the security of any rate applicable to or chargeable with the maintenance of a prison without any further security, for the purpose of altering, enlarging, or rebuilding any subsisting prison or building any new prison in pursuance of this act, such sums of money as may be recommended by one of her Majesty's principal secretaries of state.

Sect. 30. It shall be lawful for one of her Majesty's principal secretaries of state to appoint a proper person to be a surveyor general of prisons for the purpose of advising prison authorities on the construction of prisons, and reporting to the secretary of state on the several plans of prisons which may be sent to him for his report, and for the performance of such other duties connected with the construction of prisons as may be from time to time entrusted to him by the secretary of state.

7. *Building, enlargement, and rebuilding of prisons.*

28 & 29 Vict. c. 126.

Approval or disapproval of secretary of state.

Charge of borrowed monies.

Certain clauses of 10 & 11 Vict. c. 16, as to borrowing money incorporated.

Public works' loan commissioners to lend money for building prisons.

Appointment of surveyor-general of prisons.

VIII. Contracts for Maintenance of Prisoners and Appropriation of Prisons.

Sect. 31. Any prison authority may contract with any other prison authority having a prison in conformity with the requisitions of this act, that the latter authority is to receive into and maintain in its

Contracts by prison authorities for maintenance of prisoners.

(a) 10 Vict. c. 16, ss. 75—88.

(b) 16 & 17 Vict. c. 40.

8. *Contracts for maintenance of prisoners and appropriation of prisons.* prison or one of its prisons all prisoners maintainable at the expense of the former authority, or any particular class or classes of such prisoners: provided—

28 & 29 Vict. c. 126.

Expenses of contracts between prison authorities.

That no such contract shall be valid unless the prison of the latter authority is approved by one of her Majesty's principal secretaries of state as being a fit prison to receive the prisoners contracted to be received there.

Sect. 32. A contract entered into between prison authorities for the reception into and the maintenance in the prison of the one authority of the prisoners maintainable by the other authority may include the costs of conveying the prisoners to prison, and all other costs incurred in respect of such prisoners.

All monies payable under the contract shall be raised in the same manner in which monies for defraying the expenses of the prison for which a substitute is provided under the contract would be raiseable; and where such expenses are not by law wholly defrayable out of one fund, and a difference arises between the several persons interested in the several funds applicable to defraying such expenses as to what proportion ought to be applied to paying the expenses arising under the contract, such difference shall be settled by arbitration in manner hereinafter mentioned.

Appropriation of prisons for purposes of classification.

Sect. 33. Where two or more prisons are within the jurisdiction of the same prison authority, that authority may carry into effect the requisitions of this act with respect to the separation of prisoners or the enforcement of hard labour by appropriating particular prisons to particular classes of prisoners.

Public notice of prisons being appropriated to certain prisoners.

Sect. 34. Where a change has been made as to the prison to which prisoners committed within the jurisdiction of any prison authority may be sent by reason of such authority having appropriated any of its prisons to a particular class of prisoners, or having contracted with another prison authority for the reception of its prisoners, or from any other cause, notice of such change shall be published once at the least in each of two successive weeks in some newspaper or newspapers usually circulated within the jurisdiction of the said prison authority, and a copy thereof shall be served upon the gaoler of every prison within such jurisdiction.

29 & 30 Vict. c. 100.

29 & 30 Vict. c. 100, "An Act for the Amendment of the Laws relating to Prisons," recites that orders of her Majesty in council have been made changing the places at which assizes may be held, and with a view to such changes requiring the prisoners of certain prison authorities to be removed to prisons beyond the jurisdiction of such authorities:

And whereas difficulties have arisen in relation to the maintenance of the prisoners so removed: enacts,

As to maintenance of prisoners removed out of the jurisdiction of the authority liable to maintain them.

Sect. 1. Where, in pursuance of any orders of her Majesty in council, prisoners committed for offences arising within the jurisdiction of one prison authority hereinafter referred to as "the sending authority," have been or may hereafter be committed or sent to the prison of another prison authority hereinafter referred to as "the receiving authority," then, if and so long as no contract with respect to the maintenance of such prisoners exists, all expenses that have previously to the passing of this act been incurred, or may hereafter be incurred by the receiving authority in the conveyance, maintenance, or care of the prisoners of the sending authority, or otherwise by reason of such prisoners having been committed or sent to the prison of the receiving authority, including a due proportion of the salaries of officers, and the expense of repairing, adding to, or altering the prison, shall be deemed to be a debt due from the sending authority to the receiving authority, and shall be payable out of the same rate or funds out of which the expenses of maintaining the prisoners of the sending authority are by law payable.

Sect. 2. Any dispute as to the amount of expenses payable by the sending authority to the receiving authority in pursuance of this act shall be deemed to be a difference authorised by "The Prisons' Act, 1865," to be settled by arbitration, and the provisions of the said act shall apply accordingly.

Sect. 3. Payment by the sending authority to the receiving authority of any expenses incurred before the passing of this act shall be made by 4 equal yearly instalments, the first of such instalments to be paid within three months from the passing of this act; and all monies so payable by instalments shall bear interest at the rate of 4 per cent. per annum from the date of the passing of this act until the time of the payment thereof.

Payment by the sending authority to the receiving authority of any expenses incurred after the passing of this act shall be made half-yearly, or at such other times as may be determined by the said authorities; and any monies not paid at the time appointed for the payment thereof shall bear interest at the rate of 4 per cent. per annum from such time until the time of the payment thereof.

Sect. 4. The prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the sending authority, be deemed to have been and to be the prison of the sending authority, except that the sending authority shall have no right to interfere in the management of the prison of the receiving authority, and that the prisoners of the sending authority shall be in the legal custody of the gaoler of the prison of the receiving authority, and shall, as respects prison discipline, be in all respects subject to the jurisdiction of the receiving authority.

9. *Penalty for inadequate prisons.*

29 & 30 Vict. c. 100.

Dispute as to amount to be determined by arbitration.

Time of payment of expenses by sending authority to receiving authority.

As to custody of prisoners in custody of receiving authority.

IX. *Penalty for inadequate Prisons.*

Sect. 35. Whenever it appears to one of her Majesty's principal secretaries of state that default has been made in any prison in complying with the requisitions of this act in respect of the separation of prisoners or of the enforcement of hard labour, or of providing a chapel or suitable room for religious worship, it shall be lawful for the said secretary of state to certify such non-compliance in writing under his hand to the commissioners of her Majesty's Treasury, and upon such certificate being given no contribution shall thenceforth be paid out of monies provided by parliament towards the expenses of maintaining any prisoners in that prison until the said secretary of state has revoked his certificate, upon being satisfied that the defaulting prison has been brought into conformity with the requisitions of this act, and then only from the date of such revocation:

28 & 29 Vict. c. 126.

Government allowance withheld from inadequate prisons.

Provided,—

- 1st. That this section shall not affect the payment of any contribution payable on or before the 31st December, 1866:
- 2nd. That before the certificate of the said secretary of state is given under this section with respect to any prison, a copy of the report of the inspector of prisons relating to that prison, and a statement of the grounds on which the said secretary proposes to give his certificate, shall be sent to the prison authority; and it shall be lawful for such authority, upon receiving a copy of the said report and statement, to address any explanations or observations relating thereto to the said secretary of state:
- 3rd. Whenever the certificate of the secretary of state is given under this section in respect of a prison, a copy of the said statement of grounds, accompanied with any such explanations or observations as aforesaid, shall be laid before parliament.

Sect. 36. If at any time it appear to one of her Majesty's principal

Power of secretary

9. *Penalty for inadequate prisons.*

28 & 29 Vict. c. 126.
of state to close
inadequate pri-
sons.

secretaries of state that a prison authority has, in respect of any prison within its jurisdiction, made default for 4 successive years in complying with the requisitions of this act with respect to the separation of prisoners, or with respect to the enforcement of hard labour, or with respect to providing a chapel or suitable room for religious worship, the said secretary of state may, by notice under his hand, addressed to the authority of that prison, and forwarded by post in a prepaid letter to the gaoler of the prison, or otherwise delivered to him, require that authority, within a time specified in such notice, to bring such prison into conformity with the requisitions of this act with respect to such matters as aforesaid, or to exercise the powers given to such authority by this act of contracting for the removal of the whole or a number of its prisoners proportioned to the inadequacy of its prison in respect of such separation or means of providing such hard labour to some other prison where means exist for carrying into effect the requisitions of this act with respect to the separation of prisoners or means of enforcing hard labour: and if any prison authority to whom such notice is given fail, within 6 months after the receipt thereof, to comply with the requirements thereby made, the said secretary of state may order the said inadequate prison to be closed, and direct the removal of the prisoners therein and the committal of future prisoners to some other prison, the authority of which may be willing to receive them; and upon such order being made it shall be the duty of the gaoler of the said inadequate prison, without further warrant, to remove all the prisoners therein to the substituted prison named in the order of the secretary of state, and such substituted prison shall thenceforth, and so long as such order is in force, for all purposes relating to the committal, detention, trial, and punishment of the prisoners so removed, and of the prisoners committed thereto in pursuance of this section, be deemed to be the prison of the defaulting authority, and that authority shall pay, out of any rates or monies applicable to the support of the inadequate prison, all expenses incurred in and about the closing of that prison, and the removal of the prisoners therein to the substituted prison; and all expenses incurred by the authority of the substituted prison in respect of the prisoners committed to that prison in pursuance of this section shall be defrayed by the authority of the inadequate prison in the same manner in all respects as if that authority had contracted in pursuance of this act with the authority of the substituted prison for the reception in the last-mentioned prison of prisoners belonging to the authority of the inadequate prison.

Notice of any order made by the said secretary of state in pursuance of this section shall be published in the "London Gazette," and once at least in 2 successive weeks in one of the newspapers usually circulating in the county, city, borough, or place in which the prison to which the order relates is situate, and a copy of the gazette or newspaper containing such order shall be conclusive evidence of its contents.

X. Offences in relation to Prisons.

Assisting prisoners to escape.

Sect. 37. Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding 2 years.

Punishment for carrying spirituous liquors or

Sect. 38. Every person who, contrary to the regulations of the prison, brings or attempts by any means whatever to introduce into

any prison any spirituous or fermented liquor or tobacco, and every officer of a prison who suffers any spirituous or fermented liquor or tobacco to be sold or used therein, contrary to the prison regulations, on conviction shall be sentenced to imprisonment for a term not exceeding 6 months, or to a penalty not exceeding 20*l.* (a), or both in the discretion of the court, and every officer of a prison convicted under this section shall, in addition to any other punishment, forfeit his office and all arrears of salary due to him.

Sect. 39. Every person who, contrary to the regulations of a prison, conveys or attempts to convey any letter or other document, or any article whatever not allowed by such regulations, into or out of any prison, shall on conviction incur a penalty not exceeding 10*l.* (a), and if an officer of the prison shall forfeit his office and all arrears of salary due to him, but this section shall not apply in cases where the offender is liable to a more severe punishment under any other provision of this act.

Sect. 40. The visiting justices shall cause to be affixed in a conspicuous place outside the prison a notice setting forth the penalties that will be incurred by persons committing any offence in contravention of the 3 preceding sections.

11. Discharge of prisoners.

28 & 29 Vict. c. 126.
tobacco into prison.

Punishment for carrying letters into and out of prisons.

Notice of penalties to be placed outside of prison.

XI. Discharge of Prisoners.

Sect. 41. Any prisoner confined in a prison whose term of imprisonment would, according to his sentence, expire on any Lord's day, shall be entitled to his discharge on the Saturday next preceding such Lord's day; and every gaoler of every prison having the custody of any such prisoner as aforesaid is hereby required and authorised to discharge such prisoner on the Saturday next preceding any such Lord's day.

When term of imprisonment expires on Sunday, prisoner to be discharged on preceding day.

Sect. 42. Where any prisoner is discharged from prison, the visiting justices may order a sum of money not exceeding 2*l.* to be paid out of any monies under their control, and applicable to the payment of the expenses of the prison, by the gaoler to the prisoner himself, or to the treasurer of a certified Prisoners Aid Society, on his receiving from such society an undertaking in writing, signed by the secretary thereof, to apply the same for the benefit of the prisoner, or, if that becomes impossible, to appropriate the whole or any unapplied part thereof for the benefit of such other prisoner or prisoners discharged from the said prison as the visiting justices may direct.

Allowance to discharged prisoner.

Sect. 43. When a prisoner is discharged from prison the visiting justices of the prison may provide such prisoner out of any monies under their control, and applicable to the payment of the expenses of the prison, with the means of returning to his home or place of settlement, by causing his fare to be paid by railway, or in any other convenient manner.

Discharged prisoners provided with means of returning to place of settlement.

By 25 & 26 Vict. c. 44, s. 1, The justices having jurisdiction over any gaol or house of correction to which the gaol act (b) extends may, at any court of general or quarter sessions, or at any quarterly sessions, upon the application of any one or more member or members of a Prisoners Aid Society, and after examining the rules of such society, and receiving such evidence as they think fit as to the condition of such society, issue a certificate under the hand of their chairman to

25 & 26 Vict. c. 44. Power to justices to grant certificates of approval of prisoners aid societies;

(a) See sect. 52, *post*, p. 899, as to recovery of penalties.

(b) By the expression "gaol act" was meant the 4 Geo. 4, c. 64, but

now by 28 & 29 Vict. c. 126, s. 77, it is to mean the act 28 & 29 Vict. c. 126.

12. *Purchase of land.* the effect that such society is approved of by them for the purposes of this act; and they may, at any future court of general or quarter sessions, or at any future quarterly sessions, upon due cause shown, by a writing under the hand of their chairman, revoke or suspend such certificate; and any society in respect of which such certificate as aforesaid has been granted and remains in force shall be deemed to be a "Certified Prisoners Aid Society," and to be entitled to such privileges as are hereinafter mentioned.

25 & 26 Vict. c. 44.
and to revoke or
suspend the same.

XII. Purchase of Land.

28 & 29 Vict. c. 126.
Certain provisions
of 8 & 9 Vict. c. 18,
and 23 & 24 Vict.
c. 106, incorpo-
rated.

Sect. 44. Any prison authority may purchase and hold such lands or easements relating to lands as they may require for the purposes of this act; and to facilitate such purposes "The Lands Clauses Consolidation Act, 1845," and the act amending the same, 23 & 24 Vict. c. 106, shall be incorporated with this act, with the exceptions and subject to the conditions hereinafter contained; that is to say:—

1. There shall not be incorporated with this act the sections and provisions of "The Lands Clauses Consolidation Act, 1845," hereinafter mentioned; that is to say, s. 16, whereby it is provided that the capital is to be subscribed before the compulsory powers are to be put in force; s. 17, whereby it is provided that the certificate of the justices shall be evidence that the capital has been subscribed; the provisions relating to the entry upon lands by the promoters of the undertaking contained in ss. 84-91, both inclusive; s. 123, whereby a limit of time for the compulsory purchase of land is imposed; or the provisions relating to access to the special act:
2. In the construction of this act and the said incorporated acts this act shall be deemed to be the special act, and the prison authority shall be deemed to be the promoters of the undertaking, and the word "lands" shall include any easement in or out of lands:
3. The prison authority shall not, except in respect of lands contiguous to a prison, and required for the purpose of enlarging a prison or rendering it more commodious or safe, put in force the provisions of the said incorporated acts with respect to the purchase of land otherwise than by agreement.

Confirmation of
title to lands pur-
chased for purpose
of prison.

Sect. 45. When any lands have been purchased for the purposes of a prison in pursuance of this act, such lands shall, at the expiration of 5 years from the date of a conveyance having been made to any person or body corporate on trust for such purposes, absolutely vest in that person or body corporate for all the estate or interest purported to be conveyed, to be held on trust for the aforesaid purposes; and if before the expiration of the said term of 5 years any proceedings are taken on which judgment is obtained for the recovery of the possession of the said lands, then within 2 calendar months after judgment has been obtained there shall be paid to the person obtaining such judgment, instead of the delivery of possession of the lands, all costs incurred in obtaining such judgment and compensation for the full value of his estate or interest in such lands, the amount of such compensation to be ascertained in manner provided by the said Lands Clauses Consolidation Act, 1845, in case of disputed compensation as to land, and to be calculated on the basis of the value of the land at the time of the purchase thereof.

Sale of unneces-
sary prisons.

Sect. 46. Any prison authority may sell any prison or land belonging to or held on trust for them as such prison authority that appears to them to be unnecessary by reason of their having provided for

the accommodation of their prisoners, and the monies arising from such sale shall be applied in discharging any expenses that may have been or may hereafter be incurred by such authority in building, altering, enlarging, or rebuilding any prison within their jurisdiction, or otherwise in aid of the rate raiseable for the maintenance of their prison.

14. *Visiting justices.*

28 & 29 Vict. c. 126.

Sect. 47. No sale or purchase shall be made in pursuance of this act by a prison authority, unless not less than 3 weeks previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority, of their intention to take into consideration the propriety of making such a sale or purchase at a time and place to be mentioned in such notice.

Conditions of sale.

Any sale in pursuance of this act may be made by private contract or public auction, and subject to any special conditions as to title or other matters the vendors may think expedient. No purchaser shall be required to examine into the propriety of the sale of any prison or land in pursuance of this act, or into the appropriation of any monies paid by him to the vendors; and any such sale shall, in the absence of actual fraud on his part, be valid so far as he is concerned, notwithstanding any omission to give such notice as aforesaid, or any other impropriety in the sale or misapplication of the purchase money.

XIII. Recovery of Penalties, Actions, Inquests on Prisoners.

Sect. 48. It shall be the duty of the coroner having jurisdiction in the place to which the prison belongs to hold an inquest on the body of every prisoner who may die within the prison. Where it is practicable, one clear day shall intervene between the day of the death and the day of the holding the inquest; and in no case shall any officer of the prison, or any prisoner confined in the prison, be a juror on such inquest.

Inquests on prisoners.

As to inquests on persons executed within gaols, see *post*, p. 907.

Sect. 49. General issue may be pleaded to any action brought for anything done in pursuance of this act.

Sect. 50. The venue is to be laid in the county or place where the act complained of was committed, and to be begun within 6 months.

Sect. 51. Any difference authorised or directed by this act to be settled by arbitration shall be referred to the arbitration of a barrister-at-law to be appointed in writing, on the application of any party to the difference, by any judge of assize of the last preceding or of the next succeeding circuit; and all the provisions of "The Common Law Procedure Act, 1854," relating to compulsory references, shall be deemed to extend to any such arbitration, with this addition, that it shall be obligatory on the arbitrator, at the request of any party to the difference, to state a special case for the opinion of a superior court.

Sect. 52. Offences under this act, with the exception of felonies, and of offences for the mode of trial of which express provision is made by this act, shall be prosecuted summarily before 2 justices acting for the division or place where the matter requiring the cognizance of such justices arises, and in manner directed by 11 & 12 Vict. c. 43, and any act amending the same.

Recovery of penalties.

XIV. Visiting Justices.

Sect. 53. The justices within every prison jurisdiction, in sessions assembled, shall, at their first sessions in each year, nominate 2 or more justices, with their consent, to be visitors of each prison within

Appointment of visiting justices.

15. *Law of prisons generally.*

28 & 29 Vict. c. 126.

their jurisdiction, with power, if they think fit, to declare such nomination to be for the whole year, or to renew the same or make a fresh nomination in each succeeding quarter of the year; and one or more of the visiting justices so appointed shall from time to time visit and inspect each prison, and shall examine into the state of the buildings, so as to form a judgment as to the repairs, additions, or alterations which may appear necessary, strict regard being had to the requisitions of this act with respect to the separation of prisoners, and enforcement of hard labour in prisons, and shall further examine into the conduct of the respective officers, and the treatment and conduct of the prisoners, the means of setting them to work, the amount of their earnings, and the expenses attending the prison, and shall inquire into all abuses within the prison, and shall take cognizance of matters of pressing necessity, and within the powers of their commission as justices, and regulate the same, and shall once at least in each quarter of a year make a report to the justices in sessions assembled.

Power to make rules as to visiting justices.

Sect. 54. The justices in sessions assembled may make rules with respect to the duties of visiting justices, and from time to time repeal or alter any rule so made, and make other rules in addition thereto or in substitution therefor, but no rules shall be valid which are inconsistent with any provision of this act.

Visits to prison by any justice.

Sect. 55. Any justice of the peace having jurisdiction in the place to which a prison belongs may, whenever he thinks fit, enter into and examine the condition of such prison, and of the prisoners therein, and he may enter any observations he may think fit to make in reference to the condition of the prison, or abuses therein, in the visitors' book to be kept by the gaoler; and it shall be the duty of the gaoler to draw the attention of the visiting justices, at their next visit to the prison, to any entries made in the said book; but he shall not be entitled in pursuance of this section to visit any prisoner under sentence of death, or to communicate with any prisoner, except in reference to the treatment in prison of such prisoner, or to some complaint that such prisoner may make as to such treatment.

XV. Law of Prisons Generally.

Abolition of distinction between gaol and house of correction.

Sect. 56. Subject to the provisions of this act with respect to the appropriation of prisons to particular classes of prisoners, every prison to which this act applies (a) shall be deemed to be a gaol and house of correction, but no class of prisoners that have not previously to the commencement of this act been confined in any prison shall be confined there until one of her Majesty's principal secretaries of state has certified that such prison is a fit place of confinement for that class of prisoners.

Jurisdiction over prison.

Sect. 57. Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison.

Custody of prisoners (a).

Sect. 58. Every prisoner confined in a prison shall be deemed to be in the legal custody of the gaoler, provided that nothing in this act contained shall affect the jurisdiction or responsibility of the sheriff in respect of prisoners under sentence of death, or his jurisdiction or control over the prison where such prisoners are confined, and the officers thereof, so far as may be necessary for the purpose of carrying into effect the sentence of death, or for any purpose relating thereto; and in any prison in which sentence of death is required to

(a) By sect. 3 this act does not apply to convict prisons or to any naval or military prison.

be carried into effect on any prisoner, whether such prison is or not the common gaol of the county, the sheriff shall, for the purposes of carrying that sentence into execution, be deemed to have the same jurisdiction with respect to such prison as he has by law with respect to the common gaol of a county, or would have had if this act had not passed.

Sect. 59. The gaoler of any prison in which debtors are confined shall give security to the sheriff for their safe custody to such amount as may be determined by agreement, or, in default of agreement, may be settled by the justices in sessions assembled; and any such security may be given to the sheriff and his successors in office, and shall be deemed to enure to the benefit of each succeeding sheriff in the same manner as if he were individually named therein.

Sect. 60. The sheriff shall not be liable for the escape from imprisonment of any prisoner other than a debtor.

Sect. 61. Any writ, warrant, or other legal instrument addressed to the gaoler of a particular prison, describing the prison by its situation or other definite description, shall be valid, by whatever title such prison is usually known, or whatever be the description of the prison, whether gaol, house of correction, bridewell, penitentiary, or otherwise.

Sect. 62. The gaoler of every prison shall deliver or cause to be delivered to the judges of assize, and to the justices in quarter sessions, a calendar of all prisoners in custody for trial at such assizes or gaol sessions, in the same way as the sheriff of a county has hitherto been required by law to deliver a calendar of such prisoners when committed to the common gaol of the county, and the sheriff shall no longer be required to deliver or cause to be delivered such calendar.

Sect. 63. A prisoner may be brought up for trial, and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another, to which such prisoner may be legally removed, for the purpose of being tried or undergoing his sentence, and no prisoner whilst in custody of a gaoler shall be deemed to have escaped, although he may be taken into different jurisdictions or different places of confinement.

Sect. 64. Prisoners may be removed from one prison to another prison or place of confinement within the jurisdiction of the same prison authority, or to the prison of any other authority, with the consent of such last-mentioned authority, by order of the justices in sessions assembled, for the purpose of enabling any prison to be altered, enlarged, or rebuilt, or in case of a contagious or infectious disease breaking out in any prison, or for any other reasonable cause; and in case of emergency such removal may be made in pursuance of an order under the hands of the visiting justices; and any prisoners removed from a prison in pursuance of this section may, by order of the justices in sessions assembled, be taken back by the gaoler to the prison from whence they were removed, or be removed to any other place in which they can legally be imprisoned.

Sect. 65. It shall be lawful for her Majesty, by an order under the hand of one of her Majesty's principal secretaries of state, to direct any person in prison in England and Wales under sentence of any court, or of any competent authority, for any offence committed by him, to be removed from the prison in which he is confined to any other of her Majesty's prisons within England and Wales, there to be imprisoned during his term of imprisonment.

Sect. 66. Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, that the receiving authority is to receive into and maintain in its prison any prisoners main-

15. *Law of prisons generally.*

28 & 29 Vict. c. 126.

Security to sheriff.

Responsibility of sheriff.

Description of prison in writ.

Gaoler of prison to deliver calendar.

Removal of prisoners for trial.

Removal of prisoners in other cases.

Her Majesty may order prisoners to be removed from one prison to another.

Custody and trial of prisoners in a substituted prison.

15. *Law of
prisons generally.*

28 & 29 Vict. c. 126.

Misdemeanants
of first division.

55 Geo. 3, c. 50.

Fees or gratuities
payable at gaols
and bridewells
abolished.

Action for im-
proper fee paid.

Prisoners charged
with felony or
misdemeanor and
acquitted, dis-
charged without
payment of fees,
&c.

Fees usually paid
to clerks of court,
assize, &c. abo-
lished.

tainable at the expense of the contracting authority, the prison of the receiving authority shall for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority.

Sect. 67. In every prison to which this act applies prisoners convicted of misdemeanor, and not sentenced to hard labour, shall be divided into at least 2 divisions, one of which shall be called the first division; and whenever any person convicted of misdemeanor is sentenced to imprisonment without hard labour it shall be lawful for the court or judge before whom such person has been tried to order, if such court or judge think fit, that such person shall be treated as a misdemeanant of the first division, and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this act (a).

By stat. 55 Geo. 3, c. 50, intituled "An Act for the abolition of gaol and other fees connected with the gaols in England," it is enacted, that all fees and gratuities paid or payable by any prisoner, on the entrance, commitment, or discharge to or from prison, shall absolutely cease, and the same are hereby abolished and determined.

Assumpsit for money had and received will lie against a gaoler, where, by the regulations of a prison made by the magistrates, certain rates are settled for lodgings, &c., within the prison, and the gaoler takes more than that sum, even though he has paid it over to the magistrates to whom he accounts. (*Miller v. Aris*, 3 *Esp.* 231.)

Sect. 4, enacts, that every prisoner who now is or hereafter shall be charged with or indicted for any felony, or as an accessory thereto, or with or for any misdemeanor, before any court holding criminal jurisdiction within that part of the United Kingdom of Great Britain and Ireland called England, against whom no bill of indictment shall be found by the grand jury, or who, on his, her, or their trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large, without payment of any fee or sum of money, for or in respect of his, her, or their discharge, to any person or persons whomsoever; except only in such cases wherein the prisoner shall have been charged, and shall then stand charged, with any process authorising the detention of such prisoner: Provided always, that if it shall happen that any prisoner who shall so stand charged with any process authorising his detention as aforesaid, shall have been discharged in supposed obedience to this act, by reason that the sheriff or other officer entitled to have detained him was, at the time of such his discharge, ignorant that there was any such charge against him, it shall in such case be lawful for such sheriff or other officer, on receiving information of such charge, presently to retake the prisoner so discharged as aforesaid, and thereupon forthwith to detain him in custody upon such charge, in such manner as the said sheriff or other officer might have done if such prisoner had not been set at large; and that, upon his being so retaken, the said prisoner shall be deemed, for the purpose of that suit, to have been in custody continually from the time when he so first stood charged as aforesaid.

Sect. 5. All such fees as have been usually paid or payable to the several clerks of assize, and clerks of the peace, clerks of the court, or

(a) That is to say, he is not to be deemed a prisoner charged with or convicted of any crime, see sect. 4, *ante*, p. 864.

their deputies, in that part of the United Kingdom of Great Britain and Ireland called England, in any of the cases aforesaid, shall absolutely cease, and the same are hereby abolished and determined; and, from and after the passing of this act, no clerk of assize, clerk of the peace, clerk of the court, or their deputies, shall ask, demand, take, or receive any sum or sums of money, from any of the said prisoners as fees, for or in respect of his, her, or their discharge.

Sect. 6. In lieu and satisfaction of such lawful fees so abolished as aforesaid, the treasurers, or other proper officers, of the several counties in England, or of such districts, hundreds, ridings, or divisions of a county as are not usually assessed to the county at large, and of such cities, towns corporate, cinque ports, liberties, franchises, and places, as do not pay to the rates of the several counties in which they are respectively situated, shall, on receiving a certificate signed by one or more judge or justice of the peace, before whom such prisoner shall have been discharged as aforesaid (which certificate the judge or justice is hereby required to give), pay out of the rates of such county, or of such district, hundred, riding, or division, or out of the public stock of such city, town corporate, cinque port, liberty, franchise, or place, such lawful sum as has been usually paid upon that occasion, for every prisoner discharged as aforesaid, to such clerk of assize, clerk of the peace, or clerk of the court, or their respective deputies; which several sums so paid in pursuance of this act shall be respectively allowed to the said treasurer and officers by the justices before whom their accounts shall be passed.

Sect. 7. Each and every clerk of the peace, or his or their deputy or deputies, and all and every officer who shall claim any fees or indemnification for the same, by virtue of any of the provisions hereinbefore contained, for and in respect of any such prisoners, shall deliver at each and every session of the peace, or at some adjournment thereof, an account of all fees so due to him, or for which he shall claim any indemnification; which account shall be verified upon oath in court, before the chairman of such sessions.

Sect. 8. The clerks of assize shall, at each and every assize to be holden, deliver in to the judge of the assize who shall sit for the trial of such prisoners, an account of such fees as shall be due to him for and in respect of such prisoners; which account shall be verified upon oath before such judge to whom such account shall be delivered.

Sect. 9. From and after the passing of this act, any clerk of assize, clerk of the peace, clerk of the court, or their deputies, or other officers, exacting such fees, shall be rendered incapable of holding his or their offices, and be guilty of a misdemeanor.

Sect. 10. And whereas it hath been customary in some places for the sheriff or under-sheriff to demand for the liberate granted to any debtor on his discharge, a fee or gratuity, enacts, that such liberate shall be granted to such debtor free of all expenses; and that it shall be in the power of the justices of the peace for each county, city, or town, assembled in quarter session, subject however to the approbation of the judges of assize, to make such compensation to the sheriff or under-sheriff, out of the county, city, or town rate, as shall to them seem fit (a).

Sect. 11. And whereas there are several cities, towns corporate, and places within this kingdom, which do not contribute to the payment of

15. *Law of prisons generally.*

55 Geo. 3, c. 50.

County treasurers to pay allowances for places not usually assessed to county at large.

Indemnification for fees to clerks of peace.

Clerks of assize to deliver account of fees.

Officers exacting fees.

Misdemeanor.

Liberates to debtors granted free of expense: compensation made to sheriffs for same.

(a) It was held in *R. v. Justices of Middlesex* (3 B. & Adol. 100), that the justices of Middlesex have jurisdiction under this section to award compensation to the sheriff of Mid-

dlesex; the judges of the Courts of King's Bench and Common Pleas being judges of assize for that county; and a mandamus was directed to them to award such compensation.

16. *Discontinu-
ance of certain
prisons, &c.*

55 Geo. 3, c. 50.

How allowances
raised for places
which do not con-
tribute to county
rates.

any county rate, and have no town rate, or public stock ; and doubts may arise whether such cities, towns corporate, and places, can be legally rated and assessed towards the payment of the salaries, allowances, and compensations in lieu of such fees and gratuities ; that in all such cases the salaries, allowances, and compensation, in lieu of fees and gratuities hereinbefore directed to be made, shall be raised, levied, collected, and paid, within such cities, towns corporate, and places, by a separate rate and assessment to be made by the churchwardens and overseers of the poor of the several parishes and precincts within such cities, towns corporate, and places, and by such and the like ways, methods, and means, as the rates for the relief of the poor are, can, or may be raised, levied, and collected, in such cities, towns corporate, and places.

Allowances in
certain places paid
out of poor's rates.

Sect. 12. And whereas it may happen that the sums of money to be raised in the said cities, towns corporate, and places, or some or one of them, to answer and pay such salaries, allowances, and compensations hereinbefore directed to be made in lieu of fees and gratuities by this act abolished, may be so small, that it may not be convenient to make an equal separate rate and assessment for the same, upon the said parishes and precincts within such cities, towns corporate, and places, enacts, that in such last-mentioned case, and when and as often as the same shall happen, the salaries, allowances, and compensations shall and may, by order of the said judge or judges, or justices in sessions assembled as aforesaid, be paid out of the monies from time to time raised for the relief of the poor in the said several cities, towns corporate, and places ; and the treasurers or persons from time to time having the management of the said monies raised for the relief of the poor in the same cities, towns corporate, and places respectively, are hereby authorised and required to pay the said sums of money so ordered to be paid by the said judge or judges, or justices, of the said last-mentioned monies, when and as often as the same shall be so ordered : Provided always, that the order for such allowances as may be made by the justices of the peace assembled in general or quarter sessions, be approved by the judge or judges of assize on the first circuit ensuing after such warrant shall have been made out by the justices of peace assembled in general or quarter sessions for any county, city, or town, and that such order shall not be deemed or taken as a legal order without such warrant from the judge or judges of assize ; Provided always, that should there be more parishes than one in the same district, the payments are to be made and levied in such rates and proportion as the respective parishes pay to the poor rate.

Proviso.

Proviso.

Gaolers exacting
any fee, &c. from
prisoners.

Sect. 13. Any gaoler, who shall, from and after the first day of October next, exact from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain any prisoner in custody for non-payment of any fee or gratuity, shall be rendered incapable of holding his office, be guilty of a misdemeanor, and be punished by fine and imprisonment. (See further, "*Extortion*," Vol. II.)

Misdemeanor.

Not to extend to
King's Bench, &c.

Sect. 14. Nothing in this act contained shall be construed to extend to the King's Bench prison, his Majesty's prison of the Fleet, the Marshalsea, and Palace Courts.

XVI. Discontinuance of Certain Prisons and Removal of Prisoners.

Prohibition of

Sect. 68. After the commencement of this act no person shall be

committed to any of the prisons mentioned in the second schedule hereto (a).

All persons who before the passing of this act might lawfully have been committed to any of the said scheduled prisons shall, after the passing thereof, be committed to the prison of the county in which the said scheduled prison is situated; and such county prison shall, for all purposes relating to or consequential on the committal, trial, detention, or punishment of prisoners committed or removed thereto in pursuance of this part of this act, be regarded in law as if it were the said schedule prison.

In this part of this act, so far as it relates to the prison at Richmond in the said second schedule mentioned, "County" shall mean the North Riding of Yorkshire, and so far as relates to the prison at Rye in the same schedule mentioned the county gaol of Lewes shall be deemed to be the prison of the county.

Sect. 69. As soon as conveniently may be after the commencement of this act the gaoler of each of the said scheduled prisons shall, without writ of habeas corpus or other writ for that purpose, remove every prisoner under sentence or committed for trial in such prison to the prison of the county in which the said scheduled prison is situate, and deliver such prisoner into the custody of the gaoler of the said county prison, together with the writ and other process under which the prisoner was arrested or confined; and the gaoler of the said county prison shall be bound to receive such prisoner, and shall give a receipt to the gaoler of the said scheduled prison for every prisoner removed in pursuance of this section.

Sect. 70. The expenses which may be incurred by any county in the conveyance, transport, maintenance, safe custody, and care of every prisoner confined, in pursuance of this part of this act, in the county prison instead of in one of the said scheduled prisons, including the expenses of the removal of the prisoners from one prison to another, shall be defrayed in manner provided by law in cases where the prisoners committed for offences arising within any borough or other place that does not contribute to the county rate are sent to any prison of a county, and there is no special contract between such borough or other place and the county relative to such prisoners.

Sect. 71. The prison authority of any of the said scheduled prisons may sell the same in manner provided by this act (b) in case where a

16. *Discontinuance of certain prisons, &c.*

28 & 29 Vict. c. 126.
committals to prisons in second schedule.

Removal of prisoners in scheduled prisons.

Expenses of prisoners confined in county prisons under act.

Power to use scheduled prisons as lock-up houses.

(a) That is to say—

Prisons of	Legal character of prison.	County.
Aberystwith	Borough prison .	Cardigan.
Bradninch	" .	Devon.
Faversham	" .	Kent.
Helstone	" .	Cornwall.
King's Lynn	" .	Norfolk.
Lichfield	" .	Stafford.
Maldon	" .	Essex.
Newcastle-under-Lyme	" .	Stafford.
Penzance	" .	Cornwall.
Richmond	" .	York.
Romney Marsh	Liberty	Kent.
Rye	Borough	Sussex.
South Molton	"	Devon.
Tenterden	"	Kent.

(b) *Ante*, p. 898.

16. *Discontinuance of certain prisons, &c.*

28 & 29 Vict. c. 126.

Power to allow compensation to persons deprived of office.

31 Vict. c. 21.

Compensation to officers of all discontinued prisons.

As to expression "justices in sessions assembled."

prison appears to a prison authority to be unnecessary by reason of its having provided for the accommodation of its prisoners in some other adequate prison, or may, with the sanction of the said secretary of state, cause the same to be used as a police station house or a lock-up house, and the money arising from any sale made in pursuance of this section shall be applied in discharging any expenses that may be incurred by such authority in the maintenance of its prisoners, or otherwise in aid of the rate applicable to prison purposes.

Sect. 72. The justices in sessions assembled having jurisdiction over each of the said scheduled prisons may allow such compensation or allowance as they think fit to any person who, by reason of the passing of this part of this act, is deprived of any salary or emoluments, so that no such compensation or allowance exceeds the proportion of the salary and emolument, if any, which might be granted under similar circumstances to a person in the civil service under the acts for regulating such compensations or allowances for the time being in force; and any compensation or allowance so allowed shall be paid out of any rates applicable to the payment of the salaries of such officers, subject to this proviso, that when the power to levy such rates is vested in a different body from the justices, the consent of such last-mentioned body shall be obtained to the amount allowed.

By the 31 Vict. c. 21 (which is to be construed as one with the Prisons act, 1865, 28 & 29 Vict. c. 126), after reciting that certain prisons mentioned in the second schedule to the 28 & 29 Vict. c. 126, are directed to be discontinued: And that by sect. 72 of the said act the justices in sessions assembled are empowered to award compensation to any person deprived of any salary or emolument by the discontinuance of any of the said prisons: And that it is expedient to extend the power of awarding compensation to all cases in which prisons are discontinued:

By sect. 3 it is enacted the justices in sessions assembled having jurisdiction over any such discontinued prison as is herein-after mentioned may allow such compensation or superannuation allowance as they think fit to any person who, by reason of the discontinuance of such prison, is deprived of any salary or emolument, so that no such compensation or superannuation allowance exceed the proportion of the salary or emolument which might be granted under similar circumstances to a person in the civil service under the acts for regulating such compensations or superannuation allowances for the time being in force; and any compensation or superannuation allowance so allowed shall be paid out of any rates or property applicable to the payment of the salaries of the officers of such prison before the discontinuance thereof, subject to this proviso, that when the power to levy such rates or such property is vested in a different body from the justices, the consent of such last-mentioned body shall be obtained to the amount of compensation or superannuation allowance allowed.

"Discontinued prison" shall for the purposes of this section mean any prison other than the prisons specified in the second schedule to the said Prisons act which has ceased to be used as a prison since the date of the passing of the said Prisons act, 1865, or which may hereafter cease to be used as a prison.

Sect. 4. The expression "justices in sessions assembled" shall in this act mean as follows; that is to say,

1. As respects any prison belonging to any county, except as herein-after mentioned, or to any riding, division, hundred, or liberty of a county, having a separate court of quarter sessions, the justices in quarter sessions assembled:
2. As respects any prison belonging to any county divided into ridings or divisions, and maintained at the common expense of

such ridings or divisions, the justices of the county assembled at gaol sessions: *17. Regulations as to executions within prisons.*

3. As respects any prison belonging to the city of London, or the liberties thereof, the court of the lord mayor and aldermen :
4. As respects any prison belonging to any municipal borough, the justices of the borough assembled at sessions to be held by them at the usual time of holding quarterly sessions of the peace, or at such other time as they may appoint :
5. As respects any prison belonging to any city, district, borough, or town having a separate prison jurisdiction, and not herein-before mentioned, the justices or other persons having power at law to make rules for the government of such prison.

31 Vict. c. 21.

XVII. Regulations as to Executions within Prisons.

31 & 32 Vict. c. 24.

By the 31 & 32 Vict. c. 24, "An Act to provide for carrying out of capital punishment within prisons," after reciting that it is expedient that capital punishments should be carried into effect within prisons : it is enacted,

Sect. 2. Judgment of death to be executed on any prisoner sentenced after the passing of this act on any indictment or inquisition for murder shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. Judgment of death to be executed within walls of prison.

Sect. 3. The sheriff charged with the execution, and the gaoler, chaplain, and surgeon of the prison, and such other officers of the prison as the sheriff requires, shall be present at the execution. Sheriff, &c. to be present.

Any justice of the peace for the county, borough, or other jurisdiction to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff or the visiting justices of the prison proper to admit within the prison for the purpose, may also be present at the execution.

Sect. 4. As soon as may be after judgment of death has been executed on the offender, the surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, and deliver the same to the sheriff. Surgeon to certify death ; and declaration to be signed by sheriff, &c.

The sheriff and the gaoler and chaplain of the prison, and such justices and other persons present (if any) as the sheriff requires or allows, shall also sign a declaration to the effect that judgment of death has been executed on the offender.

Sect. 5. The coroner of the jurisdiction to which the prison belongs wherein judgment of death is executed on any offender shall within 24 hours after the execution hold an inquest on the body of the offender, and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender ; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff. Coroner's inquest on body.

No officer of the prison or prisoner confined therein shall in any case be a juror on the inquest.

Sect. 6. The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him ; provided that if one of her Majesty's principal secretaries of state is satisfied on the representation of the visiting justices of a prison that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly. Burial of body.

17. *Regulations as to executions within prisons.*

31 & 32 Vict. c. 24.

Power to secretary of state to make rules, &c. to be observed on execution of judgment of death.

Such rules to be laid before parliament.

Penalty for signing false certificate, &c.

Certificate, &c., to be sent to secretary of state, and exhibited on or near entrance to prison.

Provisions as to duties and powers of sheriff, &c. extended.

Forms in schedule.

Application of act to Ireland.

Saving clause as to legality of execution.

General saving.

Sect. 7. One of her Majesty's principal secretaries of state shall from time to time make such rules and regulations to be observed on the execution of judgment of death in every prison as he may from time to time deem expedient for the purpose, as well of guarding against any abuse in such execution as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

Sect. 8. All such rules and regulations shall be laid upon the tables of both houses of parliament within 6 weeks after the making thereof, or if parliament be not then sitting within 14 days after the next meeting thereof.

Sect. 9. If any person knowingly and wilfully signs any false certificate or declaration required by this act, he shall be guilty of a misdemeanor, and on conviction thereof shall be liable, at the discretion of the court, to imprisonment for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 10. Every certificate and declaration and the duplicate of the requisition required by this act shall in each case be sent with all convenient speed by the sheriff to one of her Majesty's principal secretaries of state, and printed copies of the same several instruments shall as soon as possible be exhibited and shall for 24 hours at least be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed.

Sect. 11. The duties and powers by this act imposed on or vested in the sheriff may be performed by and shall be vested in his under sheriff or other lawful deputy acting in his absence and with his authority, and any other officer charged in any case with the execution of judgment of death.

The duties and powers by this act imposed on or vested in the gaoler of the prison may be performed by and shall be vested in the deputy gaoler (if any) acting in his absence and with his authority, and (if there is no officer of the prison called the gaoler) by the governor, keeper, or other chief officer of the prison and his deputy (if any) acting as aforesaid.

The duties and powers by this act imposed on or vested in the surgeon may be performed by and shall be vested in the chief medical officer of the prison (if there is no officer of the prison called the surgeon).

The duties by this act imposed on the chaplain may, in the event of the absence of the chaplain, be performed by the assistant chaplain or other person acting in place of the chaplain.

Sect. 12. The forms given in the schedule to this act, with such variations or additions as circumstances require, shall be used for the respective purposes in that schedule indicated, and according to the directions therein contained.

Sect. 13. contains modifications of the act with reference to Scotland.

Sect 14. In the application of this act to Ireland the expressions "chief secretary to the lord lieutenant," and "board of superintendence," shall be substituted for the expressions "one of her Majesty's principal secretaries of state," and "visiting justices," respectively.

Sect. 15. The omission to comply with any provision of this act shall not make the execution of judgment of death illegal in any case where such execution would otherwise have been legal.

Sect. 16. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this act had not passed.

THE SCHEDULE.

Certificate of Surgeon.

I, *A. B.*, the surgeon [or as the case may be] of the [describe prison], hereby certify that I this day examined the body of *C. D.*, on whom judgment of death was this day executed in the [describe same prison]; and that on that examination I found that the said *C. D.* was dead.

Dated this day of .

(Signed) *A. B.*

Declaration of Sheriff and others.

We, the undersigned, hereby declare that judgment of death was this day executed on *C. D.* in the [describe prison] in our presence.

Dated this day of .

(Signed) *E. F.*, sheriff of .
 L. M., justice of the peace for .
 G. H., gaoler of .
 J. K., chaplain of .
 &c. *&c.*

XVIII. Repeal of Statutes, and Saving Clauses.

Sect. 73. After the commencement of this act there shall be repealed the several acts specified in the 3rd schedule hereto to the extent in the said schedule mentioned (a).

18. Repeal of statutes, and saving clauses.

31 & 32 Vict. c. 24.

28 & 29 Vict. c. 126.
 Acts and parts of acts in third schedule repealed.

(a) That is to say—

Date.	Title of Act.	[Extent of Repeal.
4 Geo. 4, c. 64.	An act for consolidating and amending the laws relating to the building, repairing, and regulating of certain gaols and houses of correction in England and Wales.	The whole act.
5 Geo. 4, c. 85.	An act for amending an act of the last session of parliament relating to the building, repairing, and enlarging of certain gaols and houses of correction, and for procuring information as to the state of all other gaols and houses of correction in England and Wales.	The whole act.
6 Geo. 4, c. 40.	An act to enable justices of the peace in England in certain cases to borrow money on mortgage of the rate of the city, riding, or place for which such justices shall be then acting.	The whole act.
7 Geo. 4, c. 18.	An act to authorise the disposal of unnecessary prisons in England.	The whole act.

Gaols and Houses of Correction.

18. *Repeal of statutes, and saving clauses.*

Sect. 74. No repeal hereby enacted shall affect,—

1. Any order made, sentence passed, or other act or thing duly done under any acts hereby repealed :

28 & 29 Vict. c. 126.

Date.	Title of Act.	Extent of Repeal.
5 & 6 Will. 4, c. 38.	An act for effecting greater uniformity of practice in the government of the several prisons in England and Wales, and for appointing inspectors of prisons in Great Britain.	Sects. 2, 5, 6, 11, and 12.
5 & 6 Will. 4, c. 76.	An act to provide for the regulation of municipal corporations in England and Wales.	Sects. 115 and 116.
6 & 7 Will. 4, c. 105.	An act for the better administration of justice in certain boroughs.	Sects. 1 and 2.
1 Vict. c. 78. . .	An act to amend an act for the regulation of municipal corporations in England and Wales.	Sects. 37 and 38.
2 & 3 Vict. c. 56. .	An act for the better ordering of prisons.	The whole act, except sects. 18, 19, 20, and 21, and except sects. 22 and 23 so far as they relate to prisons or places of confinement to which this act does not extend.
3 & 4 Vict. c. 25. .	An act to amend the act for the better ordering of prisons.	The whole act.
5 & 6 Vict. c. 53. .	An act to encourage the establishment of district prisons.	The whole act.
5 & 6 Vict. c. 98. .	An act to amend the law relating to prisons.	Sects. 1, 2, 4, 8, 9, 13, 25, and 30, so far as the said sections relate to prisons within the provisions of this act.
7 & 8 Vict. c. 50. .	An act to extend the powers of the act for encouraging the establishment of district courts and prisons.	The whole act.
7 & 8 Vict. c. 93. .	An act to enable barristers to arbitrate between counties and boroughs to submit a special case to the superior courts.	The whole act.
11 & 12 Vict. c. 39. .	An act to facilitate the raising of money by corporate bodies for building or repairing prisons.	The whole act.
16 & 17 Vict. c. 43. .	An act for enabling the justices of counties to contract in certain cases for the maintenance and confinement of convicted prisoners in the gaols of adjoining counties.	The whole act.

2. Any right or privilege acquired, any security given, or other liability incurred under any act hereby repealed :
3. Any penalty, forfeiture, or other punishment incurred in respect of any offence against any act hereby repealed :
4. Any appointment to an office made under any act hereby repealed, or any power of removing the holder of such office, or otherwise dealing with such office as respects the existing holder thereof in manner provided by any act hereby repealed :
5. The power of committing prisoners to any prison except in so far as the same may be altered in pursuance of powers given by this act.

18. *Repeal of statutes, and saving clauses.*

28 & 29 Vict. c. 126.

No repeal hereby enacted to affect any order made, &c.

Sect. 75. All cells certified before the commencement of this act by any inspector of prisons as being fit to be used for the separate confinement of prisoners shall be deemed to be cells certified for such purpose under this act.

Certificates as to cells.

Sect. 76. Any unrepealed act of parliament in which reference is made to the provisions of any act hereby repealed shall be construed as if in such first-mentioned act reference had been made to the corresponding provisions of this act.

Saving as to repealed provisions referred to in other acts.

Sect. 77. In the construction of the act of the 25 & 26 Vict. c. 44, the expression "the Gaol Act" shall mean this act instead of the act therein referred to.

Saving as to meaning of gaol act, 25 & 26 Vict. c. 44.

Sect. 78. Nothing in this act contained shall affect the right of any creditor who may have advanced any monies for building, repairing, or otherwise for the purposes of any prison discontinued in pursuance of this act, or may have advanced any monies on any mortgage or other security : and it shall be lawful for such creditor to pursue any remedies for recovering the principal or interest monies due to him, and to enjoy the benefit of any security of which he may be possessed in the same manner as if this act had not passed, and as if the acts hereby repealed had remained in full force.

Saving of rights of creditors.

Sect. 79. Nothing in this act contained shall affect the tenure of office or salary or superannuation allowance of any officer of a prison, not being one of the said scheduled prisons, appointed prior to the commencement of this act, but such officer shall remain entitled to the same tenure of office, salary, and superannuation allowance as if this act had not passed : Provided that the superannuation allowance of any prison officer appointed before the commencement of this act may, on the application of such officer, and with the consent of the justices in sessions assembled, be calculated on the same scale on which the superannuation allowances of officers appointed after the passing of this act are directed to be calculated.

Saving of superannuation allowances.

Date.	Title of Act.	Extent of Repeal.
25 & 26 Vict. c. 44. .	An act to amend the law relating to the giving of aid to discharged prisoners.	Sects. 2 and 3.
26 & 27 Vict. c. 79. .	An act for the amendment of the law relating to the religious instruction of prisoners in county and borough prisons in England and Scotland.	So much of section 3 as is inconsistent with the provisions of this act, and the whole of section 5, but so far only as relates to prisons to which this act applies.

Gaols for juvenile offenders.

28 & 29 Vict. c. 126.

Saving as to rules.

Saving as to appointment of officers.

Saving as to commissions.

Sect. 80. All rules in force in any prison that are inconsistent with this act, or the regulations in the schedule hereto, shall be repealed from and after the commencement of this act, but all other rules in force in any prison shall so continue until altered in manner in this act provided.

Sect. 81. Nothing in this act contained shall affect any right vested by act of parliament or charter in the council of any municipal borough of appointing a gaoler, chaplain, or other officer to the prison of such borough.

Sect. 82. Nothing in this act contained relating to the custody of prisoners shall affect the validity of any commission of gaol delivery, commission of oyer and terminer, or other commission, precept, writ, warrant, or other document, notwithstanding the same may be addressed to or make mention of the sheriff of any county, city, or place, instead of being addressed to or making mention of the gaoler of a prison or prisons; and every such commission, precept, writ, warrant, or other document shall be obeyed by the gaoler, and take effect in the same manner as if the gaoler had been named therein instead of the sheriff.

Gaols for Juvenile Offenders.

[1 & 2 Vict. c. 82; 3 & 4 Vict. c. 90.]

1 & 2 Vict. c. 82.

Her Majesty may appoint the buildings at Parkhurst to be used as a prison for juvenile offenders.

Officers to be appointed by the crown.

Young offenders under sentence may be removed to Parkhurst prison.

Stat. 1 & 2 Vict. c. 82, intituled "An Act for establishing a Prison for young Offenders," enacts, that it shall be lawful for her Majesty, by warrant under the royal sign manual, to appoint that the said buildings at Parkhurst shall be used as a prison for the confinement of such offenders as are hereinafter specified, as soon as the same can be fitted and completed for that purpose; and the said buildings shall thereupon become a prison for the lawful confinement of such offenders, and shall be within the provisions of 5 & 6 Will. 4, c. 38 (a).

Sect. 2. That it shall be lawful for one of her Majesty's principal secretaries of state to appoint for Parkhurst prison a governor, a chaplain, being a clergyman not having any other cure of souls, a surgeon, a matron, and such other officers, assistants, and servants, as may be necessary for the service and discipline of the prison, and at pleasure to remove all or any of the said governor, chaplain, surgeon, matron, and other officers, assistants, and servants, and to appoint others in their room, and to fix the salaries to be paid to each of them.

Sect. 3. That it shall be lawful for one of her Majesty's principal secretaries of state to direct the removal to Parkhurst prison of any young offender, male or female, as well those under sentence or order of transportation (b), as those under sentence of imprisonment, who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol, prison, or place in which such offender shall be confined: Provided always, that every offender so removed, who shall be under sentence of transportation, shall nevertheless be within the provisions of the 5 Geo. 4, c. 84, in case the secretary of state shall direct that he or she shall be afterwards removed from Parkhurst prison, as hereinafter provided.

(a) By 5 & 6 Vict. c. 98, s. 12, part of Parkhurst barracks may be taken for the purposes of the prisoners.

(b) The punishment of transportation is now abolished and penal servitude substituted for it.

Sect. 4. That every offender who shall be so removed to Parkhurst prison shall continue there until he or she shall be transported according to law, or shall become entitled to his or her liberty, or until the secretary of state shall direct the removal of such offender to the gaol, prison, or place from which he or she shall have been brought, or in which he or she may be lawfully confined; and the sheriff, gaoler, or other person having the custody of any offender whose removal to Parkhurst prison shall be ordered in manner aforesaid, shall, with all convenient speed after the receipt of any such order, convey or cause to be conveyed every such offender to Parkhurst prison, and shall there deliver him or her to the governor of the prison, with a true copy, attested by such sheriff or gaoler, of the caption and order of the court by which such offender was sentenced, containing the sentence of every such offender by virtue whereof he or she shall be in the custody of such sheriff or gaoler, and also a certificate specifying such particulars within the knowledge of the sheriff or gaoler concerning such offender, as may be from time to time directed by the secretary of state; and the governor shall give a receipt in writing to the sheriff or gaoler for his discharge; and all reasonable expenses which the sheriff or gaoler shall incur in every such removal shall be paid by the county, riding, division, city, borough, liberty, or place for which the court in which the offender was convicted shall have been holden.

Sect. 5. That it shall be lawful for the secretary of state at any time to order any offender to be removed from Parkhurst prison as incorrigible, and in every such case the offender so removed shall be liable to be transported or confined, under his or her original sentence or sentences of transportation or imprisonment, to the full extent of the term or terms specified in such sentence or sentences, and shall be subject to all the consequences of such sentence or sentences, in the same manner as if no order for sending him or her to Parkhurst prison had been made.

Sect. 6. That after the delivery of any such offender as aforesaid into the custody to which he or she shall be so ordered as aforesaid, such governor or other person having the custody of offenders under his direction shall, during the term for which such offender shall remain in his custody, have the same powers over such offender as are incident to the office of a sheriff or gaoler, and in case of any abuse of such custody, or other misbehaviour or negligence in the discharge of his office, shall be liable to the same punishment as a gaoler is now liable to by law.

Sect. 7. That the secretary of state shall be empowered from time to time to make rules for the government and regulation of Parkhurst prison, and for the discipline of the offenders imprisoned therein, and to subscribe a certificate that they are fit to be enforced; and all such rules shall be laid before Parliament within 6 weeks after such rules shall be certified, or if Parliament be not then sitting, within 6 weeks after the next meeting of Parliament.

Sect. 8. That it shall be lawful for the secretary of state, from time to time to specify, by such regulations as aforesaid, such offences which, if committed in Parkhurst prison by male convicts, shall appear to him deserving of corporal punishment; and if any male offender in Parkhurst prison shall commit any offence whereby he shall under any regulation then in force become liable to corporal punishment, the governor of the said prison shall have power to inflict such punishment.

Sect. 9. That as soon as the said buildings shall be appointed to be used as a prison as aforesaid for the reception of offenders, it shall be lawful for her Majesty, with the advice of her privy council, to nominate and appoint 3 or more fit and discreet persons to be visitors of the said prison, and from time to time to remove all or any of such visitors, and appoint others in their stead, or in the stead of such as shall die

Gaols for juvenile offenders.

1 & 2 Vict. c. 82.
Term of imprisonment in Parkhurst prison.

Gaolers, &c., having the custody of offenders ordered to be placed there, shall cause them to be delivered to the governor thereof.

As to offenders removed from Parkhurst prison as incorrigible.

Powers of the governor.

Secretary of state to make regulations for the government of the prison.

Corporal punishment may be inflicted in Parkhurst prison.

Visitors to be appointed by the Queen in council.

Gaols for juvenile offenders.

1 & 2 Vict. c. 82.

Visitors to report the state of the prison to the secretary of state,

Offenders pardoned conditionally may be committed to house of correction if they break the condition, or remitted to their former sentence.

Offenders break-prison, &c.

or resign, or be unable by sickness or otherwise to attend; and one or more of such visitors shall personally visit such prison at least 3 times in each quarter of a year, and oftener, if occasion shall require, and shall examine into the behaviour and conduct of the respective officers, and the treatment, behaviour, and condition of the prisoners, and of all abuses within the prison; and if he or they shall discover any abuse or abuses therein, he or they is or are hereby required to report the same in writing to one of her Majesty's principal secretaries of state.

Sect. 10. That the said visitors shall make a half-yearly report in writing to one of her Majesty's principal secretaries of state, concerning the state and condition of such prison, and of any abuse or abuses which they may have observed, or have reason to believe to exist in the said prison, or in the management of the prison, as well as of the general state of the prisoners as to morals, discipline, and employment, and observance of rules.

Sect. 11. And whereas her Majesty has lately exercised her royal prerogative of mercy in granting pardons to young offenders who have been sentenced to transportation or imprisonment, upon the condition of placing himself or herself under the care of some charitable institution for the reception and reformation of young offenders named in such pardon, and conforming to and abiding by the orders and rules thereof: and whereas the same has been found beneficial: and it is expedient that some provision should be made for carrying the same more fully into effect; be it enacted, that in case any young offender who has been or shall be hereafter sentenced to transportation or imprisonment, has been or shall be pardoned by her Majesty for such offence upon such condition as aforesaid, and has or shall accept such conditional pardon, and shall afterwards abscond from such institution, or wilfully neglect or refuse to abide by and conform to the rules thereof, it shall and may be lawful to and for any justice of the peace acting in and for the county, city, riding, or division wherein the said offender shall actually be at the time he shall so abscond, or neglect or refuse as aforesaid, upon due proof thereof made before him upon the oath of one credible witness, by warrant under his hand and seal, to commit the party so offending for every such offence to any gaol or house of correction for the said county, city, riding, or division, with or without hard labour, for any period not exceeding 3 calendar months for the first offence, and not exceeding 6 calendar months for the 2nd or any subsequent offence, in case the managers or directors of any such charitable institution shall be willing to receive any such young offender after his or her being convicted of absconding, neglecting, or refusing as aforesaid; and in every case such imprisonment shall be in addition to the original sentence of such young offender; and after the expiration of the time of such additional punishment, if the managers or directors of any such charitable institution shall refuse to receive such offender, or if her Majesty shall not be pleased to exercise her royal prerogative in pardoning the breach of the condition on which the former pardon was granted, the said party shall forfeit all benefit of the said pardon, and shall be remitted to the original sentence, and shall undergo the residue thereof, as if no such pardon had been granted.

Sect. 12. That if any offender who shall be ordered to be confined in Parkhurst prison, shall at any time during the term of such confinement break prison, or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, or from any lands belonging to the prison, or from the person or persons having the lawful custody of such offender, he or she so breaking prison or escaping shall be punished, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he or she at the time of his or her breach of prison or escape was

subject to be confined, and if under sentence of transportation, in such manner as persons under sentence of transportation escaping from or breaking out of any other prison or place of confinement are liable to be punished; and if an offender so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of prison, he or she shall be adjudged guilty of felony; and if any offender who shall be ordered to be confined in the said prison shall, at any time during the term of such confinement, attempt to break prison or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape, he or she so offending, being convicted thereof, shall be punished by imprisonment for a term not exceeding 12 calendar months, in addition to the punishment to which he or she at the time of committing any such offence was subject.

Gaols for juvenile offenders.

1 & 2 Vict. c. 82.

Sect. 13. That every person who shall rescue any offender who shall be ordered to be confined within Parkhurst prison, either during the time of his or her conveyance to the said prison, or whilst such offender shall be in the custody of the person or persons under whose care and charge he or she shall be so confined, and also every person who shall aid in any such rescue, shall be guilty of felony; and every person having the custody of any such offender, or employed by the person having such custody, as a keeper, under-keeper, turnkey, assistant, or guard, who shall knowingly allow such offender to escape, and also every person who shall, by supplying arms, tools, or instruments of disguise, or otherwise in any manner aid any such offender in any escape, or in any attempt to make an escape, though no escape be actually made, or who shall attempt to rescue any such offender, or aid in any such attempt, though no rescue be actually made, shall be guilty of felony; and every person having such custody, or being so employed by the person having such custody as aforesaid, who shall carelessly allow any such offender to escape, shall be guilty of a misdemeanor, and being lawfully convicted of the same, shall be liable to fine or imprisonment, or to both, at the discretion of the court.

Penalty on rescuing or aiding in the rescue of offenders.

Sect. 14. That any offender, who shall escape, break prison, or be rescued in manner aforesaid, shall be tried before the justices of oyer and terminer or gaol delivery, either for the county where he or she shall be apprehended and re-taken, or for the county in which the said offence shall have been committed; and in case of any prosecution for any such escape, attempt to escape, breach of prison or rescue, either against the offender escaping or attempting to escape, or breaking prison, or being rescued, or against any other person or persons concerned therein, or aiding the same, a copy, properly attested, of the order of commitment to Parkhurst prison, shall, after proof made that the person then in question before the court is the same who was delivered with such order, be sufficient evidence to the court and jury that the person then in question was so ordered to such confinement; and the expenses of the said prosecution shall be paid by the county, riding, division, city, borough, liberty, or place for which the court in which the offender was convicted shall have been holden.

Where offenders escaping shall be tried.

Order of commitment to be evidence.

Expenses of prosecution.

Sect. 15. That the provisions of all acts of parliament for rendering justices of the peace more safe in the execution of their office shall extend to the governor of Parkhurst prison acting in the execution of this act.

Protection of the governor.

Sect. 16. That all actions, suits, and prosecutions to be commenced against any person or persons for any thing done in pursuance of this act, shall be laid and tried in the county or place where the fact was committed, and shall be commenced within 6 months after the fact committed, and not otherwise or afterwards.

Limitation of actions.

Sect. 17. That a report upon the state of Parkhurst prison, and of

An annual report

Goals for juvenile offenders.

to be laid before parliament.

3 & 4 Vict. c. 90.

Court of Chancery empowered to assign the care of any infant convicted of felony to any person other than the testamentary or natural guardian.

Court may rescind or alter such assignment;

and award costs in certain cases.

Infant not to be sent beyond the seas, &c.

No fee to be taken by officer of court.

Counsel may be assigned.

This act not to interfere with execution of the sentence.

the persons confined therein, and also an account of the expenses of carrying this act into execution, shall be annually laid before Parliament by the secretary of state.

By 3 & 4 Vict. c. 90, intituled "An Act for the care and education of infants who may be convicted of felony," it is enacted, "that in every case in which any person being under the age of 21 shall hereafter be convicted of felony, it shall be lawful for her Majesty's High Court of Chancery, upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such court shall find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural guardian, of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations respecting the maintenance, education, and care of such infant, as the said Court of Chancery shall think proper to prescribe and direct; and upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every testamentary or natural guardian of such infant, and no person or persons shall be entitled to use or exercise any power or control over such infant, which may be inconsistent with such order of the said Court of Chancery: Provided always, that the said court may at any time rescind such assignment, or from time to time rescind, alter, or vary any such terms and conditions, or such regulations, as to the said court may seem fit; and provided also, that the said High Court of Chancery shall and may award such costs as to it may seem fit, against any such person or persons who shall make such application as aforesaid, if such application shall not appear to the said court well founded; and such costs shall be payable to any parent or other natural or testamentary guardian of any such child who shall oppose such application.

Sect. 2. That in every case it shall be a part of the terms and conditions upon which such care and custody shall be assigned, that the infant shall not, during the period of such care and custody, be sent beyond the seas, or out of the jurisdiction of the said Court of Chancery.

Sect. 3. That no fee, reward, emolument, or gratuity whatsoever shall be demanded, taken, or received by any officer or minister of the said Court of Chancery, for any matter or thing done in the said court, in pursuance of this act; and that upon the making or opposing of any such application, it shall be lawful for any judge of the said court to assign counsel learned in the law, and to appoint a clerk or practitioner of the said court to advise and carry on or to oppose such application, who are hereby required to do their duties therein without fee or reward.

Sect. 4. Provided always, and be it further enacted, That nothing in this act contained shall affect, or in any manner interfere with, the execution of the sentence which may have been passed upon such infant upon his or her conviction. (See "*Reformatories and Juvenile Offenders.*")

Gleaning.

IT is a vulgar error to suppose that there is in general a right of gleaning over another's lands. And trespass lies against any person who gleans without the owner's consent, and without any particular custom, since no such right exists at common law. (*Steel v. Houghton*, 1 H. Bla. 51; *Worlledge v. Manning*, *id.* 53; *Gould, J., diss.*) Parishioners or other inhabitants of a particular parish or district may, indeed, in some places, have a right by custom to glean on lands within that parish or district at proper times, and under proper restrictions; but that custom, like all others against common law right, must be clear and undisputed. Such a custom could not perhaps extend to non-parishioners or inhabitants of another parish or district.

In *R. v. Price*, (4 Burr. 1925), on a motion for an information against a justice of the peace for a misdemeanor in oppressively committing some poor inhabitants of the parish of C. for felony in gleaning in a field belonging to a farmer of that place, (which they insisted they had a right to do by law, and by the usage and custom of that parish), oath was made by the farmer before the justice, that these people had stolen his barley in the straw, and he now swore that he had forbidden them, and yet they took it by handfulls, and that he had suffered the loss of about twenty bushels of barley by their carrying it off two days together. *Per Curiam*—"We are of opinion, that the justice, in this case, so far from acting with any design of oppression or malice, or any bad intention, has behaved with lenity, and it would be very wrong to punish a justice by the extraordinary method of an information, when he has acted fairly and impartially; therefore, we discharge the rule with costs, as stealing under the colour of leasing or gleaning is not to be justified—there was no contest between the farmer and the poor about leasing; his only objection and his forbidding is confined to the stealing of it. As to the right of gleaning, it will be time enough to determine that point when it comes directly in question; but here the farmer had not abandoned his corn, and he has sworn that they stole it."

Gold and Silver Wares (a).

BY the 17 & 18 Vict. c. 96, "An Act for allowing gold wares to be manufactured at a lower standard than that now allowed by law, and to amend the law relating to the assaying of gold and silver wares," it is enacted:

Sect. 1. It shall be lawful for her Majesty, by any order or orders to be from time to time made by and with the advice of her privy council, to order that any gold vessel, plate, or manufacture of gold may be wrought of any standard not being less than one third part in the whole of fine gold, to be declared in any such order, and also to approve thereby of the instrument with which gold vessels, plate, and manufactures of gold shall be marked or stamped, setting forth in figures the actual fineness thereof, according to the standard so declared; and every such gold vessel, plate, and manufacture of gold may be wrought accordingly; and it shall be lawful for her Majesty, by and with the advice aforesaid, to revoke or alter from time to time any such order as aforesaid.

Her Majesty may, by order in council, allow any standard for gold wares not less than one third part in the whole.

Sect. 2. Workers or dealers in gold or silver may register their Gold and silver

(a) See "*Forgery*," p. 660, for regulations as to the forging of gold and silver marks.

Gold and silver wares.

17 & 18 Vict. c. 96.

wares may be assayed at any lawful assay office wherever manufactured.

Gold wares unnecessarily marked not liable to duty on gold plate.

Provisions of existing acts to be applicable to the new standard.

Penalty for marking gold ware of a lower standard with the mark appropriated to a higher standard.

names, marks, and places of abode at any assay office or offices established by law which they may select, and may thereupon have the wares which are manufactured by them assayed and marked at such office or offices, without being liable to any forfeiture or penalty imposed by any act now in force for not registering their names, marks, or places of abode, or for making, selling, or exporting such wares without being marked at a particular assay office, and the wares which shall be assayed as aforesaid may be sold or exposed by any person without being liable to any forfeiture or penalty, notwithstanding any provision to the contrary in any act now in force.

Sect. 3. If any of the gold wares which by any statute now in force are not liable to be assayed and marked shall nevertheless be assayed and marked as of one of the standards authorised by law, such wares shall not by reason thereof be chargeable with the duty now levied upon gold plate.

This section is repealed as to gold wedding rings by 18 & 19 Vict. c. 60, s. 2, *post*, p. 919.

Sect. 4. Nothing in this act contained shall be deemed or taken to repeal the statutes now in force relating to standards of gold wares, or to the marks for denoting the same, or any of such statutes, but the same, and all the provisions, prohibitions, penalties, and forfeitures enacted thereby respectively, shall continue to be in as full force and effect as if this act had not passed, and shall be construed with and as forming part of this act, save only that in the interpretation thereof all standards authorised by her Majesty in pursuance of this act shall be deemed and taken to be lawful standards; and all gold vessels, plate, and manufactures wrought in conformity with this act shall be deemed and taken to be lawfully wrought within the meaning of the said statutes; and all gold vessels, plate, and manufactures duly assayed and marked in conformity with this act, and being of the standard duly authorised in pursuance of the same, shall be deemed and taken to be lawfully assayed and marked within the meaning of the same statutes respectively.

Sect. 5. If any assayer or other officer or person employed by any company or corporation authorised to assay and mark gold vessels, plate, or manufactures of gold shall mark or permit or suffer to be marked any gold vessel, plate, or manufacture of gold of a lower standard with any die or other instrument used by any such company or corporation for marking gold vessels, plate, or manufactures of gold of a higher standard, every such company or corporation to which such assayer or officer shall belong or by which such person shall be employed shall for every such offence forfeit and pay to her Majesty the sum of 20*l.*, which may be sued for and recovered in such and the like manner as penalties recoverable under any act in force relating to stamp duties are to be sued for and recovered by law; and every such assayer or other officer or person employed as aforesaid, upon complaint or information made thereof by any officer of stamp duties to any justice of the peace having jurisdiction where any such offence shall be committed, upon the oath of one or more credible person or persons (which oath such justice is hereby empowered and required to administer), and upon being convicted of such offence by or before such justice, shall be by him forthwith dismissed and discharged from his said office and employment of or in the company or corporation to or in which he shall have so belonged or been so employed as aforesaid, and shall be incapable for ever afterwards of holding any office or employment in or under the same or any other such company or corporation; and every gold vessel, plate, and manufacture of gold of a lower standard so marked as last aforesaid shall and may be lawfully seized by any such company or corporation other than the company or corporation to which the offending officer or person belongs or by whom he is employed, and shall be dealt with in

like manner as is provided with respect to wares seized by virtue of the provisions of the 7 & 8 Vict. c. 22.

By the 18 & 19 Vict. c. 60, "An Act for excepting gold wedding rings from the operation of the act of the last session relating to the standard of gold and silver wares, and from the exemptions contained in other acts relating to gold wares," it is enacted:

Sect. 1. From and after the passing of this act, gold wedding rings shall be assayed and marked in like manner as gold plate not exempted is required by the statutes now in force to be assayed and marked, and all the provisions of the statutes relating to the manufacture or sale of gold plate shall apply to gold wedding rings, anything therein contained to the contrary notwithstanding.

Sect. 2. The third section of the act 17 & 18 Vict. c. 96, herein recited, is hereby repealed so far as the same might affect gold wedding rings.

Sect. 3. And whereas since the coming into operation of the said recited act certain of the companies and corporations authorised to assay and mark gold wares have assayed and marked divers gold rings of the standards required by law before the passing of the said recited act, and have upon such assaying and marking by their officers and servants demanded and received, for the use of her Majesty, the same duty as was payable to her Majesty in respect of the like gold rings when assayed and marked before the passing of the said recited act: and whereas doubts have been entertained whether such demands and receipts of such duty were lawful: be it enacted, that all such demands and receipts of such duty shall be deemed and taken to have been lawful, notwithstanding the said recited act, and that none of the said companies or corporations, or of their officers or servants, shall be liable to any action, suit, or other proceeding by reason or on account of any such demand or receipt as aforesaid.

Gunpowder.

18 & 19 Vict. c. 60.

Gold wedding rings to be assayed and marked.

Sect. 3 of 17 & 18 Vict. c. 96, repealed.

Certain companies, &c., authorised to assay and mark gold wares indemnified.

Gunpowder.

[16 Car. 1, c. 21; 46 Geo. 3, c. 121; 54 Geo. 3, cc. 152, 159; 3 & 4 Will. 4, c. 19, s. 36; 2 & 3 Vict. c. 47, s. 35; 23 & 24 Vict. c. 139; 24 & 25 Vict. c. 130; 25 & 26 Vict. c. 98.]

AS to fireworks, see "*Fire Works*," ante, p. 545.

It seemeth, that erecting powder mills, or keeping powder magazines near a town, is a nuisance by the common law; for which an indictment or information will lie. In *R. v. Williams*, (*Easter*, 12 Will. 3), there was an indictment against Roger Williams, for keeping four hundred barrels of powder near the town of Bradford, and he was convicted accordingly. And, in *R. v. Taylor*, (2 Str. 1167), the court granted an information against the defendant as for a nuisance, on affidavits of his keeping great quantities of gunpowder near Maldon in Surrey, to the endangering of the church and houses where he lived. (Or rather, it should have been expressed, to the endangering of the lives of his Majesty's subjects.) See tit. "*Nuisance*."

By stat. 16 Car. 1, c. 21, all subjects may make and sell gunpowder, and bring into the kingdom saltpetre, brimstone, or any other material for the making of it.

By stat. 46 Geo. 3, c. 121, that part of the stat. 1 Jac. 2, c. 8, which prohibits the importation of gunpowder, is repealed.

By 54 Geo. 3, c. 159, s. 6, it is enacted, that it shall and may be lawful to and for the said lord high admiral, or three or more of the commissioners for executing the office of lord high admiral aforesaid for the time being, and he and they is and are hereby authorised and empowered, from time to time, by order or notice in writing under his

Fireworks.

Erecting powder mills near a town, a nuisance.

Who may make gunpowder.

Importation.

Places appointed for breaming ships, and leaving and receiving gunpowder.

Gunpowder.

54 Geo. 3, c. 159.

or their respective hand or hands, or the hand of his or their secretary, to prohibit the breaming of any ships or vessels, lighters, barges, boats, or other craft, at any place or places on shore, where it may to them seem proper and necessary to prohibit the same, and also to order at what place or places, within or near all or any of such ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays, and navigable rivers in this kingdom as aforesaid, no private ships of war, transports, or other private or merchant ship or vessel, lighter, barge, boat, or other craft, shall come, or be laden with or having on board thereof any quantity or quantities of gunpowder, exceeding 5 lbs. weight in the whole; and also to appoint fit and proper places, either afloat or on shore, where all gunpowder, exceeding 5 lbs. weight in the whole, shall and may be left and deposited, by and from, or taken and received into, any such ships or vessels, lighters, barges, boats, or other craft; all which orders, notices, and appointments of such places shall be notified in the "London Gazette;" and that the master-general or principal officers of his Majesty's ordnance, or any three of them for the time being, shall appoint fit and proper persons there, to take in and receive, and also to give and deliver out all such gunpowder, and upon the taking in thereof to give receipts for the same, and also to grant a certificate to any such owner, master, or other person, of his having left and deposited all such gunpowder, and having made and signed a declaration in writing under his hand of his having so done, and that neither he nor any other person or persons, to his knowledge or belief, had any gunpowder exceeding 5 lbs. weight in the whole, then on board such ship or vessel, lighter, barge, boat, or other craft, as the case may require; which declaration every such master, owner, or other person is hereby required to make, as the case may require, and for which said certificate the sum of 1s., and no more shall be paid; and every such person so to be appointed as aforesaid, shall be accountable to the owner or owners of all such gunpowder for the same, and shall deliver the same to such owner or owners thereof upon demand, on being paid such reasonable sum of money for warehouse room, in proportion to the quantity of such gunpowder, and the time for which the same shall have been kept, as shall be ascertained and fixed either by the said lord high admiral, or three or more of the commissioners for executing the office of lord high admiral aforesaid, or by the master-general and principal officers of his Majesty's ordnance, or any three or more of them, by any rule, order, or regulation to be made in that behalf; and that no ship or vessel having, or having had, any such quantity of gunpowder on board, shall be allowed to clear at any custom-house in any port where there shall be any such place so to be appointed as aforesaid, without producing and leaving such certificate, together with the christian and surname of the pilot (if any) who piloted such ship or vessel into such port, at the custom-house of such port; and all and every owner, master, pilot, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft, which shall come, arrive, or be (except in cases of stress of weather), within any of the distances so to be specified as aforesaid, having on board thereof any quantity or quantities of gunpowder exceeding 5 lbs. weight together in the whole, or which, having come in under stress of weather, shall not unship and deliver all such gunpowder within the space of 24 hours next after the ceasing of such weather (and thereof forthwith give notice at the custom-house to excuse the production of such certificate), shall forfeit and pay the sum of 5*l.* for each and every 5 lbs. weight of gunpowder which shall be found, or which shall have been on board any such ship or vessel, lighter, barge, boat, or other craft, within any of the distances so to be specified as aforesaid, and so in proportion for any greater or less quantity; and every such pilot, who

Penalty.

In what case

shall wilfully and knowingly offend in the premises, and shall be thereof lawfully convicted, shall, for ever thereafter, be rendered incapable of acting as a pilot.

By 3 & 4 Will. 4, c. 19. s. 36, it shall be lawful for every such Thames police surveyor, at any time between sun-rising and sun-setting, to enter any ship or vessel (except his Majesty's ships) in the said river, docks, and creeks, and to search the same for unlawful quantities of gunpowder, and also to exercise the same powers of seizing, removing to proper places, and detaining all such unlawful quantities of gunpowder found on board any such ship or vessel, and the barrels or other packages in which such gunpowder shall be, as are given to persons searching for unlawful quantities of gunpowder, under a warrant of a justice, by virtue of the 12 Geo. 3, c. 61.

By the "Metropolitan Police Act," (2 & 3 Vict. c. 47, s. 35), superintendents or inspectors of the metropolitan police force, with constables, may, at any time between sunrise and sunset, enter any ship, boat, or vessel (except her Majesty's ships), in the river, docks, &c., to search for and seize unlawful quantities of gunpowder.

The 23 & 24 Vict. c. 139, "An Act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks," by sect. 1 repeals the 9 & 10 Will. 3, c. 7, and 12 Geo. 3, c. 61, except as to any offence theretofore committed against the same, and any penalty theretofore incurred, which offence shall be dealt with and punished and such penalty recovered as if this act had not been passed.

Sect. 2. The following regulations shall be observed with regard to the manufacture and keeping of gunpowder; (that is to say),

No such manufacture shall be carried on except in mills and other places lawfully used for such manufacture at the time of the commencement of this act, or in places licensed for that purpose as hereinafter mentioned:

The quantity of gunpowder or materials to be made into gunpowder to be at one time under any single pair of mill stones, or rollers, or runners, shall not exceed 50 lbs. as respects sporting and government powder, and 60 lbs. as respects all inferior powders, and every incorporating mill or group of incorporating mills shall be provided with a charge house for the store of mill charges properly constructed of stone or brick, and situate at a safe and suitable distance from each incorporating mill or group of incorporating mills:

The quantity of gunpowder to be subjected to pressure at one time in any presshouse shall not exceed 10 cwt.:

The quantity of gunpowder to be corned or granulated at one time in any corning or granulating house shall not exceed 12 cwt.:

The quantity of gunpowder to be dried at one time in one stove or place used for the drying of gunpowder shall not exceed 50 cwt.

The respective quantities to be at any one time in any presshouse, or corning or granulating house, shall not exceed twice the respective quantities hereby allowed to be subjected to pressure, and to be corned or granulated at one time; and the quantity to be at any one time in any drying house or dusting house shall not be more than is necessary for the immediate supply and work of such house; and for the purposes of this provision any building used with any such presshouse, corning or granulating house, drying house, or dusting house, shall be deemed part thereof, save only magazines constructed with stone or brick, and situate 40 yards at least from every such presshouse or other house as aforesaid (here-

Gunpowder.

pilots rendered incapable.

Unlawful quantities of gunpowder may be seized.

Seizure by police.

23 & 24 Vict. c. 139.

Regulations as to making and keeping of gunpowder.

Gunpowder.

23 & 24 Vict. c. 139.

inafter distinguished as expense magazines), and save only the stove in which the powder which has been dried may be cooling :

Every person keeping or using any mill for the making of gunpowder shall have (in addition to the expense magazines) a good and sufficient magazine or magazines at least 140 yards distant from the mill or mills and every presshouse and other house or place used for or in the making of gunpowder, for the receiving and safely keeping of all gunpowder made at such mill or mills, as soon as such gunpowder can from time to time be conveniently removed to such magazine or magazines, such magazine or magazines to be well and substantially built with brick or stone, and situate in such place as may have been lawfully used or duly licensed by justices before the commencement of this act or may be licensed as hereinafter mentioned, which magazine or magazines is and are hereinafter distinguished as a store magazine or magazines :

Every maker of gunpowder shall with all due diligence cause all finished gunpowder made at his mill or mills to be removed accordingly from such mill or mills and the other places used by him for or in the manufacture of gunpowder, or any magazine or storehouses used therewith, to the said store magazine or magazines required by this enactment to be distant 140 yards as aforesaid :

Every maker of gunpowder shall cause to be erected or provided good and sufficient thunder rods or lightning conductors in connexion with every store magazine where gunpowder is kept by him for the protection of such magazine from the effects of lightning.

Power to secretary of state, on application, and sufficient cause shown, to sanction the continuance or construction of any magazine within the prescribed distance.

Sect. 3. Provided always, that at any time after the passing of this act it shall be competent to the owner or lessee or occupier of any expense magazine or any store magazine which shall have been erected before the commencement of this act, and shall be situate within the prescribed distance of 40 yards or 140 yards, and also to any owner, lessee, or occupier of any mill or other place lawfully used for the manufacture of gunpowder before the commencement of this act, who is desirous to construct any expense magazine or store magazine in or in connexion with such mill or other place within such prescribed distance, to present a memorial to one of her Majesty's principal secretaries of state, setting forth that it is not necessary or required for the public safety, or that from the nature of the ground or other sufficient causes it is not practicable or expedient, to remove such magazine to the prescribed distance, or to erect such intended magazine at or beyond such prescribed distance, and thereupon the said secretary of state shall refer the matter of such memorial to such person as he may think fit, to report thereon, and such person shall, as soon as practicable thereafter, examine the magazine or the site of the intended magazine to which the memorial refers, and the surrounding ground, and shall make a report in writing thereon to the said secretary of state, who shall transmit a copy thereof to the applicant; and if on consideration of the whole matter, and any observations and explanations thereupon by the applicant, and on such further information, if any, as the said secretary of state may require, he shall be satisfied that it is not necessary for the public safety, or is impracticable or inexpedient, to remove such magazine to or beyond the prescribed distance, or to erect the intended magazine at or beyond the prescribed distance, and shall approve the site proposed for the same, he shall certify the same in writing under his hand, and deliver such certificate to the said owner, lessee, or occupier, and thereupon the magazine to which such certificate applies, or a magazine erected on

the site so approved, (as the case may be,) shall for all purposes be deemed to be at the prescribed distance; and if the said secretary of state shall not be satisfied that any existing magazine to which the memorial refers ought to remain, he shall by writing under his hand order the said magazine to be removed within a period to be therein limited, and such order shall be notified to the applicant or to the occupier of the magazine to which the order relates: Provided also, that the use and the continuance of any magazine as to which such application is made to the said secretary of state shall be deemed to be lawful during the pendency of such application, and until the expiration of the time mentioned in the order for its removal.

Sect. 4. All gunpowder made in any place where under this act it is not lawful to make gunpowder, and all gunpowder in any mill, pressing house, corning house, drying house, dusting house, or other place, exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person making or causing to be made any gunpowder contrary to this act, or keeping or causing to be kept in any such mill or place any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2s. for every pound of gunpowder so forfeited:

Every person making gunpowder without having such store magazine or magazines 140 yards distant from any mill and every other place used by him for or in the manufacture of gunpowder, shall forfeit any sum not exceeding 25l. for every month during which such person makes gunpowder without having such magazine or magazines:

And every person making gunpowder who wilfully neglects or delays removing with due diligence the finished gunpowder made at his mill or mills and the other places used by him for or in the manufacture of gunpowder from thence or from the magazines or storehouses used therewith to the store magazine or magazines distant as aforesaid, shall forfeit for every day during which such offence continues any sum not exceeding 5l.

Sect 5. No maker of gunpowder shall keep or permit to be kept any charcoal within 20 yards of any mill or other engine for making gunpowder, or of any presshouse, or drying, corning, or dusting house, or other place used in or for the making of gunpowder, or any magazine or storehouse thereto belonging; and any maker of gunpowder who acts contrary to this enactment shall forfeit any sum not exceeding 5l., or, where such charcoal is so kept for a longer period than a week, any sum not exceeding 5l. for every week during which such charcoal is so kept.

Sect. 6. The following regulations shall be observed with regard to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature; (that is to say,)

No such manufacture shall be carried on without such licence for that purpose as hereinafter mentioned, or within the respective distances hereinafter mentioned, and set opposite to the descriptions of the respective articles; (that is to say,)

Percussion caps	50 yards,
Ammunition	100 yards,
Fireworks	50 yards,
Fulminating mercury or other preparation or composition of equally explosive power	100 yards,

from any dwelling house or any building in which persons not connected with the same manufacture are employed:

No such articles as aforesaid, except percussion caps, exceeding the

Gunpowder.

23 & 24 Vict. c. 139.

Penalties for making and keeping gunpowder contrary to this act.

No charcoal to be kept within twenty yards of any mill, &c.

Regulations as to the making of loaded percussion caps and the making and keeping of ammunition, &c.

Gunpowder.

23 & 24 Vict. c. 139.

respective quantities hereinafter mentioned and set opposite to the descriptions of the respective articles, (that is to say,)

Ammunition containing 5 pounds of gunpowder,

Fireworks containing 10 pounds of explosive compound,

Fulminating mercury or other preparation or composition of equally explosive power	} 1 oz. dry, or 8 oz. mixed with 25 per cent. of water,

shall be kept in any place not licensed for that purpose as herein-after mentioned, and no such articles shall be kept in any place so licensed in excess of the respective quantities specified in the licence in that behalf:

The operation of mixing the composition for percussion caps shall be performed in a building situate at a distance not less than 20 yards from any other workshop, and no greater quantity than 5 pounds of cap composition shall at any one time be in the building where the operation of mixing is performed:

No fulminating mercury, except that which is being used in the actual preparation of the cap composition, shall be kept in any building where the operation of preparing such composition is performed, without being mixed with at least 20 per cent. of water:

The operation of loading percussion caps shall be performed in a building where no other explosive material than that employed in loading percussion caps is used or kept, and no greater quantity than 24 oz. of cap composition shall at any one time be in the building where the operation of loading is performed:

The operation of filling or charging cartridges shall be performed in a building situate at a distance not less than 20 yards from the other workshops connected with the manufacture; and no greater quantity than 50 lbs. of gunpowder, either loose or made up into cartridges, or what is equivalent, as regards explosive power, to 50 lbs. of gunpowder, (if other explosive materials be used,) shall at any one time be in any workshop connected with the manufacture:

The operation of charging or filling fireworks with explosive materials shall be performed in a building situate at a distance not less than 20 yards from the other workshops connected with the manufacture; and no greater quantity of the ordinary explosive composition used in the manufacture of fireworks than 30 lbs., whether loose or made up, or what is equivalent, as regards explosive power, to 30 lbs. of the ordinary gunpowder, shall at any one time be in any building where the operation of filling or charging is performed:

The manufacture of such fireworks as contain detonating composition, or composition which is more easily ignited by percussion or friction than ordinary gunpowder, shall be conducted in a building or buildings situate at a distance not less than 30 yards from the other workshops, and no greater quantity than 10 lbs. of such composition shall at any one time be in any building:

Every person keeping or using any factory for the making of ammunition or fireworks shall have, at a distance of not less than 50 yards from any workshop connected with the manufacture, a magazine or magazines, built with brick or stone, for the receiving and safely keeping the gunpowder or other explosive materials used in the manufacture, and the cartridges or fireworks (as the case may be) made at such factory.

Penalties for making loaded percussion caps,

Sect. 7. All loaded percussion caps made, and all ammunition, fireworks, fulminating mercury, or other explosive preparations or com-

positions made or kept, in any place where under this act it is not lawful to make percussion caps, or to make or (as the case may be) keep ammunition, fireworks, fulminating mercury, or other explosive preparations or compositions, and any quantity of ammunition, fireworks, fulminating mercury or composition kept in any place where under this act it may be lawful to keep such ammunition, fireworks, fulminating mercury, or other explosive preparation or composition, exceeding the quantity which may be lawfully kept there, shall be forfeited; and every person making or causing to be made percussion caps, or making or keeping or causing to be made or kept ammunition, fireworks, fulminating mercury, or other explosive preparation or composition, contrary to this act, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 10%.

Sects. 8 & 9 relate to fireworks, and will be found under that title.

Sect. 10. It shall be lawful for the justices of the peace for each county or other division, at their general quarter sessions, upon application made to them by any person, from time to time to license the erecting or having new mills for making gunpowder, with proper presshouses and other houses and places to be used for or in the making of gunpowder, and magazines near thereto, and also the erecting or having magazines for keeping unlimited quantities of gunpowder in such respective places, not being within London or Westminster, or any other limits hereinafter described, as may appear to them proper.

Sect. 11. It shall be lawful for the justices of the peace for each county or other division, at their general quarter sessions (a), or for the council of any borough, upon application made to them by any person, from time to time to license places for the making of loaded percussion caps, and for the making and keeping respectively of ammunition, fireworks, fulminating mercury, or other explosive preparations or compositions, and to determine the quantities of such articles respectively to be kept in any place so licensed, and to grant licences to persons to sell fireworks.

Sect. 12. Provided always, that every person making any application for any such licence as aforesaid shall give notice in writing of the intention to make the same, as also of the place or places proposed for the purposes aforesaid respectively, 14 days before making it, as hereinafter mentioned; (that is to say,) such notice shall be given, where application is made in England, to an overseer or churchwarden of the parish or place in which it is proposed to erect or make any such new mill, with such houses and places as aforesaid, or any such magazine, or to make or use any building or place for any of the purposes aforesaid, or of an adjoining parish, if the place be extra-parochial, and have no overseer; and where the application is made in Scotland, to the schoolmaster of the parish, or if there be no such schoolmaster, to the session clerk; and where the application is made in Ireland, to the clerk of the union within which the parish is included; and such applicant shall also in every such case cause the like notice to be affixed on the outside of the door or of the wall near the door of every church and chapel in such parish or place, (including places of public worship not belonging to the established church,) previously to the commencement of divine service on a Sunday 10 days at least before the making of such application.

Sect. 13. The justices (a) licensing the erecting or having of any new mills and other places to be used for or in making gunpowder, or any

Gunpowder.

23 & 24 Vict. c. 139.
or making or
keeping ammunition,
&c., contrary
to this act.

Justices to license
places for making
and keeping gun-
powder.

Justices to license
places for making
loaded percussion
caps and making
and keeping
ammunition, &c.

Notice of inten-
tion to apply for
licence to be
given 14 days
before.

Justices may
make licences
conditional on

(a) Now by 24 & 25 Vict. c. 139, s. 3, the licences are to be granted by justices in petty sessions.

Gunpowder.

23 & 24 Vict. c. 139.
precautions pre-
scribed by them
for preventing
danger being
observed.

In case of refusal
of licence, the
applicant may
memorialise
secretary of state,
who shall have
power, notwith-
standing such
refusal, to grant
the licence.

Owners of mills
may make rules
for their servants
and workmen for
preventing acci-
dents.

Penalty for doing
any act in any
mill, &c. tending
to cause explo-
sion.

magazine near thereto, or any magazine for keeping unlimited quantities of gunpowder, and the justices or council licensing any place for the making of loaded percussion caps, or for the making or keeping of ammunition, fireworks, fulminating mercury, or any other explosive preparation or composition, may, if they see fit, grant their licence conditionally upon such precautionary measures being taken and maintained with regard to the structural arrangements of every such mill, magazine, or place, the erection of mounds, or screens to separate the same from any inhabited house, and otherwise, as they may deem proper for diminishing the risk of danger to life by explosions.

Sect. 14. If, on any application for the licensing of any new mill or other place to be used for or in making gunpowder, or any magazine near thereto, or any magazine for keeping unlimited quantities of gunpowder, the justices shall refuse the licence, or grant the same only on conditions with which the applicant shall be dissatisfied, they shall, if so required by the applicant, certify such refusal or conditions, and the grounds thereof, in writing, to be signed by the chairman presiding at the hearing, and shall deliver the certificate to the applicant, who may thereupon, within 10 days from the time of the delivery thereof, transmit the same to one of her Majesty's principal secretaries of state, together with a memorial praying that, notwithstanding such refusal, the licence may be granted, or that such conditions may not be imposed, or may be altered or modified in such manner and to such extent as shall be set forth in such memorial; and it shall be lawful for the said secretary of state, if he shall so think fit, on consideration of such memorial and certificate, and if he shall think it necessary or desirable, after due inquiry from and a report by such person as he may appoint for that purpose, to grant the licence prayed for, either absolutely or with such conditions as he shall think fit, or to alter or modify the conditions imposed by the justices; and the licence so granted, or altered and modified, as the case may be, certified under the hand of the said secretary of state, shall be to all intents as valid and effectual as if made and granted by the said justices.

Sect. 15. It shall be lawful for the owner or occupier of any mill, magazine, or place in which gunpowder, ammunition, fireworks, fulminating mercury, or any other explosive preparation or composition is manufactured or kept, or loaded percussion caps are manufactured, from time to time to make such rules as he may think fit for the purpose of regulating the conduct of his servants and workmen employed in such mill, magazine, or place, so as to prevent as far as may be accidents by explosion, and from time to time to alter or rescind any such rules, and make others, provided such rules be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this act; and such rules shall be signed by such owner or occupier, and a copy thereof shall be given to every servant or workman employed in such mill, magazine, or place, who may be affected thereby, and shall be affixed in the mill, magazine, or place to which the same relate.

Sect. 16. Any servant or workman of any owner or occupier of any mill, magazine, or place in which gunpowder, ammunition, fireworks, fulminating mercury, or any other explosive preparation or composition is manufactured or kept, or loaded percussion caps are manufactured, who violates the rules made as aforesaid, and any such servant or workman, or any other person, who does, or attempts to do any act in, to, or about such mill, magazine, or place tending to cause explosion, or who brings into such mill, magazine, or place any thing tending to cause explosion, shall for every such offence be subject to a penalty not exceeding 5*l.*, on summary conviction before any justice of the peace, or in Scotland before any sheriff, justice of the peace, or

magistrate; and any such servant or workman as aforesaid, or other person so acting, may be apprehended without a warrant by any peace officer or other officer of the law, or the owner or occupier of any such mill, magazine, or place, or his servant, or by any other person authorised by such owner or occupier, or his agent or manager, and removed from the mill or other premises, and may be conveyed with all convenient dispatch before some justice, or in Scotland before any sheriff, justice, or magistrate, and such justice, sheriff, or magistrate shall proceed with all convenient dispatch to the hearing and determining of the complaint against the offender.

Sect. 17. It shall be lawful for one of her Majesty's principal secretaries of state to authorise, from time to time, such person as he may see fit to inspect and examine any mill, magazine, or place in which gunpowder, ammunition, fireworks, fulminating mercury, or any other explosive preparation or composition is manufactured or kept, or supposed to be manufactured or kept, or loaded percussion caps are made or supposed so to be, in order to see whether or not the regulations of this act concerning the manufacture and keeping of gunpowder, and such other matters as aforesaid, and concerning the making of loaded percussion caps, are complied with, and to report to such secretary of state thereon; and every person so authorised shall have authority to enter, inspect, and examine any such mill, magazine, or place, at all reasonable times in the daytime, without any previous notice for that purpose, and the owner or occupier of every such mill, magazine, or place is hereby required to furnish the means necessary for such entry, inspection, and examination:

Any owner or occupier of any mill, magazine, or place which any such person authorised by the secretary of state is empowered to enter, inspect, and examine, who refuses or neglects to furnish to such person the means necessary for making his entry, inspection, and examination, and every person who wilfully obstructs any such person in the execution of his powers, shall for every such offence forfeit 5*l*.

Sect. 18. No person shall have or keep at one time, being a dealer in gunpowder, or manufacturer of cartridges, fireworks, or rockets, more than 200 lbs. of gunpowder, and, not being such dealer or manufacturer, more than 50 lbs. of gunpowder, in any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf or other building or place, (and for the purpose of this enactment all buildings and places adjoining to each other, and occupied together, shall be deemed one house or place,) or on any river or other water, (except in carriages loading or unloading or passing on the land, or in ships, boats, or vessels, loading or unloading, or passing on any river or other water, or detained there by the tide or bad weather,) within the following limits, being the limits within which gunpowder mills or magazines may not be licensed under this act; (that is to say,) within the city of London or Westminster, or within 3 miles of either of them; or within any borough or market town, or 1 mile of the same; or within 2 miles of any palace or house of residence of her Majesty, her heirs or successors; or within 2 miles of any gunpowder magazine belonging to the crown; or within half a mile of any parish church; or in any place beyond the limits aforesaid, except in mills or other places which at the commencement of this act shall be lawfully used for the making of gunpowder, and the magazines, storehouses, and offices near and belonging thereto, and in the magazines in which greater or unlimited quantities of gunpowder may be lawfully kept at the commencement of this act, and in the places where it shall be lawful to make gunpowder, or to keep greater or unlimited quantities of gunpowder, under the provisions of this act; and all gunpowder kept beyond the quantity hereby allowed, and the barrels or receptacles in which such gunpowder shall be kept, shall be forfeited, and any person keeping

Gunpowder.

23 & 24 Vict. c. 130.

Secretary of state may authorise persons to inspect mills, &c.

Penalty for obstructing inspector.

Limitation of quantities of gunpowder to be kept by persons other than manufacturers.

Gunpowder.

23 & 24 Vict. c. 139.

Gunpowder may
be kept for mines,
under certain
conditions.

the same shall for every such offence forfeit not exceeding 2s. for every pound of gunpowder kept beyond the allowed quantity (a).

Sect. 19. It shall be lawful for any person to keep, exclusively for the use of any mine, quarry, or colliery, any quantity of gunpowder not exceeding 300 lbs. weight at any one time in any magazine or warehouse, so as such magazine or warehouse be within 200 yards of such mine, quarry, or colliery, and (unless erected and used for this purpose before the passing of this act) be not within 200 yards from any inhabited house, without the consent in writing of the occupier of such house; and it shall be also lawful for any person to keep, exclusively for the use of one or more mine, quarry, or colliery, mines, quarries, or collieries, any greater quantity of gunpowder not exceeding 4000 lbs. at any one time in any magazine, so as such magazine be well and substantially built of brick or stone, and save where continued or erected under a certificate of the secretary of state as hereinafter mentioned, be within 200 yards of the respective mine, quarry, or colliery, or one of the mines, quarries, or collieries, for the use of which such gunpowder is kept, and not within any of the limits hereinbefore particularly described, and not within 200 yards from any inhabited house, without the consent in writing of the occupier of such house: Provided always, that the owners, lessees, or occupiers of any mine, quarry, or colliery, having for the use thereof a magazine not situated as prescribed by this enactment, or being desirous of erecting a magazine not so situated, may make application by memorial to one of her Majesty's principal secretaries of state, in the like manner and for the like causes as hereinbefore provided in relation to the continuance or erection of an expense magazine or store magazine within the prescribed distance, and the secretary of state may, by his certificate, authorise the continuance or erection of the magazine to which the application relates, either absolutely or conditionally on such precautionary measures being taken and maintained as he may deem proper.

Not more than
thirty barrels by
land, and five
hundred by water,
to be conveyed at
one time.

Sect. 20. No person shall have or convey at one time more than 30 barrels of gunpowder in any waggon, cart, or other carriage by land, except in a van specially constructed for that purpose, enclosed on every side with wood, and then not more than 40 barrels, and unless such carriage form part of a railway train, and then not more than 100 barrels in any carriage forming part of such train; and no person shall have or convey at one time, within the United Kingdom, more than 500 barrels of gunpowder in any barge, boat, or other vessel by water, except in vessels with gunpowder imported from or to be exported to any place beyond the sea, or going coastwise; and all gunpowder conveyed on land or water (except in such vessels for importation or exportation of gunpowder, or going coastwise,) shall be in barrels, close joined and hooped, or in copper, zinc, or tin cases or canisters, enclosed in wooden boxes or barrels, without any iron about such boxes or barrels, and so secured that no part of the gunpowder be scattered in the passage; and each barrel shall contain no more than 100 lbs. of gunpowder; and every carriage in which gunpowder shall be conveyed by land shall have a complete covering of wood, painted cloth, tarpaulin, or wadmill tilts, over all the gunpowder therein contained; and no gunpowder shall be conveyed by water in any barge, boat, or other vessel not having a close deck (except in vessels with gunpowder imported or to be exported in manner afore-

(a) Under the repealed statute, 12 Geo. 3, c. 61, s. 11, a carman and licensed carman was held not liable for unlawfully having or keeping gunpowder where several packages amounting to 300lbs. were sent by

different persons to his warehouse in London, as a temporary halting place, until taken to their several destinations by country carriers. (*Biggs v. Mitchell*, 2 B. & S. 523.)

said, or going coastwise); and as soon as any gunpowder is put on board such vessel, all such gunpowder shall be covered with raw hides or tarpaulins; and where any gunpowder conveyed by land or water is contained in any receptacles hereby authorised other than barrels, no greater quantity shall be so conveyed than shall be equivalent to what might lawfully have been so conveyed if the same had been contained in barrels:

Gunpowder.

23 & 24 Vict. c. 139.

And all gunpowder which shall be carried or conveyed (except in such vessels with gunpowder for importation or exportation as aforesaid, or going coastwise,) within any part of the United Kingdom in greater quantity or in other manner than is hereinbefore prescribed, and the barrels or other receptacles in which such gunpowder shall be, may be seized by any person, who shall have the same authority to remove such gunpowder and barrels or receptacles, and to use for that purpose, during the space of 24 hours after seizure, the carriage or vessel in which such gunpowder shall be seized, and the tackling, beasts, and accoutrements belonging thereto, on the terms of paying a recompence for the use thereof, and to detain such gunpowder and barrels or receptacles, as is hereinafter given to persons searching under a warrant of the peace, sheriff, or magistrate, and such seizure shall be for the use of the person making the seizure, on conviction of the offender or offenders.

Sect. 21. When any barge, boat, or vessel, having stale, condemned, or returned gunpowder on board, arrives at the quay, wharf, or other place where the same is intended to be landed, no person shall begin to unload, or shall bring down to such wharf, quay, or other place with intent to load, in such vessel, any other gunpowder, until the whole or part of such stale, condemned, or returned gunpowder be first unloaded or carried away from such wharf, quay, or other place of landing; and after such unloading and carrying away of part of such gunpowder no person shall begin to load or shall so bring down with intent to load any greater quantity of other gunpowder than the part unloaded and carried away, on pain of forfeiting all gunpowder so loaded or brought down contrary to this enactment.

No gunpowder to be loaded until that condemned be unloaded.

Sect. 22. Any person having the care or management of any barge, boat, or other vessel whatsoever (except ships or vessels with gunpowder on board imported from or to be exported to places beyond sea, or going coastwise,) loaded with gunpowder, or any other person on board the same, who brings, has, or uses, or permits any person to bring, have, or use, any charcoal, lucifer matches, or other combustible matter, or any fire or lighted candle, during the time of loading, or unloading, or when the hatches are open, or smokes or wittingly permits any person to smoke on board such barge, boat, or vessel, shall for every such offence forfeit any sum not exceeding 5*l*.

Penalty for smoking, &c., on board vessels loaded with gunpowder.

Sect. 23. No person having the care of any waggon, cart, or other carriage used for the conveyance of gunpowder by land shall, after beginning to place or load therein any quantity of gunpowder, or beginning to unload the same thereout, stop or stay at any place of loading or in the loading or unloading suffer any longer time to pass than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading; and no person having the charge or care of any barge, boat, or other vessel, used for the conveyance of gunpowder by water, (except in the case of vessels loading for importation or exportation of gunpowder to or from places beyond sea, or going coastwise,) shall, after beginning to load or unload any quantity of gunpowder, stop or stay at any wharf, quay or other place of loading, or in the loading or unloading thereof suffer any longer time to pass than with the use of all due diligence shall be reasonably necessary for the purpose of loading or unloading, not exceeding 18 hours, unless hindered by the weather; and every person.

Penalty for undue delay in loading or unloading gunpowder.

Gunpowder.

23 & 24 Vict. c. 139.

Foregoing provisions to extend only to carriage of more than 100 lbs. of gunpowder.

Power to justices to issue warrants to search.

Regulations for the security of the vessels in the river Thames.

offending against this enactment shall for each offence forfeit any sum not exceeding 10*l*.

Sect. 24. None of the aforesaid provisions for or relative to the conveyance of gunpowder, or the loading or unloading thereof, shall extend to any other waggon, cart, or land carriage, or any other boat, barge, or vessel, than such as shall be loaded with or employed in conveying a quantity of gunpowder exceeding 100 lbs.

Sect. 25 (a). It shall be lawful for any justice of the peace, and in Scotland for any sheriff, justice of the peace, or magistrate, within the limits of whose jurisdiction gunpowder is suspected to be made, kept, or carried, contrary to this act, on demand made, and reasonable cause assigned upon oath by any person to issue a warrant under his hand and seal, or in Scotland under his hand, for searching in the daytime any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, ship, boat, or vessel, in which such gunpowder is suspected to be made, kept, or carried contrary to this act; and all gunpowder found to be made, kept, or carried contrary to this act, and also the gunpowder barrels or other receptacles, shall be immediately seized by the searcher, who shall with all convenient speed after the seizure remove such gunpowder, and the barrels or other receptacles in which it shall be, to such proper places as he, in conformity to the restrictions of this act, shall think fit, and in the case of any such gunpowder seized in any carriage or vessel may use for the purpose of removal, during the space of 24 hours after seizure, such carriage or vessel, with the tackling, beasts, and accoutrements belonging thereto, (paying afterwards to the owner or owners thereof a sufficient recompense for the use thereof, to be settled by the justices, sheriff, or magistrates before whom the complaint shall be heard, after the seizure, and in case of nonpayment immediately after settlement by such justices, sheriff, or magistrates, to be recoverable as in the case of pecuniary penalties under this act,) and may detain such gunpowder, and the barrels or other receptacles in which it shall be, till it shall be adjudged, on a hearing before 2 or more such justices or magistrates, or before the sheriff, whether the same shall be forfeited; and such searcher or seizer shall not be liable to any suit for such detainer, or for any loss of or damage which may happen to the said gunpowder or barrels or other receptacles, other than by his wilful act or neglect, or the wilful act or neglect of the persons with whom he shall intrust the keeping thereof: Provided, that where any gunpowder is seized under this provision, proceedings for the forfeiture thereof shall be commenced within 28 days after such seizure.

Sect. 26. No master or commander of any ship or other vessel lying in the Thames, and outward-bound, shall receive or permit to be received on board any such ship or vessel more than 25 lbs. of gunpowder (except for the Queen's service) before the arrival of such ship or vessel at, over against, or below Blackwall, and the master or commander of every ship or vessel coming into the river Thames shall (except in the case of gunpowder for the service of the crown) put on shore in proper places, in conformity to the restrictions of this act, all the gunpowder on board such ship or vessel above the quantity of 25 lbs. either before the arrival of such ship or vessel at Blackwall, or within 24 hours (if the weather shall permit) after coming to an anchor there, or to the place of unloading there, and shall not afterwards have on board more than 25 lbs. of gunpowder (except for the service of the crown), on pain of forfeiting for every offence in any of

(a) By the 25 & 26 Vict. c. 98, s. 1, this and the 27th section are to be read as if the word "gunpowder" included loaded percussion caps, am-

munition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature.

the said cases all the gunpowder found on board above the weight of 25 lbs., and the barrels or other receptacles in which such gunpowder shall be, and also not exceeding 2s. for every pound of gunpowder above the quantity of 25 lbs. *Gunpowder.* 23 & 24 Vict. c. 139.

Sect. 27 (a). The conservators of the river Thames for the time being shall from time to time appoint one or more of the harbour masters of the port of London, or other person or persons, a searcher or searchers for unlawful quantities of gunpowder in ships or other vessels in the river Thames, which person or persons so appointed are hereby authorised, at any time between sun-rising and sun-setting, to enter any ship or vessel (except her Majesty's ships) in the river Thames above Blackwall, and to search the same for unlawful quantities of gunpowder, and also shall have the same powers of seizing, removing to proper places, and detaining all such unlawful quantities of gunpowder found on board any such ship or vessel, and the barrels or other receptacles in which such gunpowder shall be, as are hereinbefore given to persons searching for unlawful quantities of gunpowder under a warrant of a justice of the peace. *Conservators of the river Thames to appoint searchers.*

Sect. 28. Any forfeiture or penalty, or forfeiture and penalty, (as the case may be,) for any offence against this act, and not herein otherwise provided for, may be enforced and recovered upon summary conviction of such offence before any 2 justices, or in Scotland before any sheriff or any 2 justices or magistrates; and, save as herein otherwise provided, one moiety of every forfeiture and penalty for any offence against this act, or violation of any rules made thereunder, shall belong to her Majesty, and the other moiety to the informer, anything in any act to the contrary notwithstanding: Provided always, that if the informer be a person appointed under this act by the secretary of state, or a servant of the person informed against, the moiety of the penalty which would otherwise belong to the informer shall be applied in such manner and to such other purposes as the justices, sheriff, or magistrates in their discretion think fit: Provided also, that such forfeitures and penalties, and the expenses attending the conviction, may be levied and recovered in Scotland by pinding and sale, and in default of payment, or of sufficient pinding, by imprisonment for any period not exceeding 3 months. *Forfeitures and penalties recoverable summarily.*

Sect. 29. The lord lieutenant or chief secretary in Ireland to have the like authorities as are before given to the secretary of state.

Sect. 30. This act shall not extend to any mills or other buildings erected or which may be erected for the purpose of making gunpowder on any lands belonging to or held for the service of the crown, or to the keeping of gunpowder at any storehouse or magazine belonging to or held for the service of the crown, or to the manufacture, loading, or keeping of percussion caps, ammunition, fireworks, or any preparation or compound of an explosive nature, in any place belonging to or held for the service of the crown, or to hinder the trial of gunpowder by her Majesty's officers, as is usual, for the service of the crown, or to the keeping of gunpowder at the magazines now erected for that purpose at Barking Creek's mouth in the county of Essex and Erith Level in the county of Kent, or to the keeping of gunpowder at the magazines or storehouses now erected near the city of Bristol, or to the keeping of gunpowder in vessels moored in the river Mersey under the provisions of the 14 & 15 Vict. c. 67, or to the carriage of gunpowder to or from magazines belonging to the crown, under a special and express order of the secretary of state for war, such order to contain the quantity of gunpowder so to be carried, and the time for which such order shall be in force, or to the carriage of gunpowder with forces on their march, or with the militia or volunteer corps *Act not to extend to mills erected on crown lands, &c.*

(a) See note to sect. 25, as to meaning of "gunpowder."

Gunpowder.

23 & 24 Vict. c. 189.

Act not to affect
54 Geo. 3, c. 159,
or to gunpowder,
&c. on board her
Majesty's ships,
&c.

Saving for proof
houses under
18 & 19 Vict. c.
cxlviii. (Local).

Not to extend to
hinder unlimited
quantities of gun-
powder being
conveyed from
ships below
Blackwall.

Saving of enact-
ment for protec-
tion of London
docks,

Saving for provi-
sions of Police
Acts.

2 & 3 Vict. c. 47,
and 9 & 10 Vict.
c. 25, to be con-
strued as referring
to this act.

during their exercise, or which shall be sent for the use of such forces, militia, or volunteer corps.

Sect. 31. This act shall not extend to repeal or alter the act of the 54 Geo. 3, c. 159, or to gunpowder, percussion caps, or combustible articles on board any ship, vessel, or boat of her Majesty or in her Majesty's service, or required or kept for the use of her Majesty's navy, her Majesty's royal marine forces, the royal naval coast volunteers, the royal naval volunteers, or any force which is or may be under the orders or control of the commissioners for executing the office of lord high admiral of the United Kingdom.

Sect. 32. This act shall not extend to prevent the keeping of gunpowder in the proof houses of the two companies authorised by The Gun Barrel Proof Act, 1855, or in magazines connected with such proof houses, provided that the quantity of gunpowder kept at the same time in any one such proof house, and the magazine (if any) connected therewith, do not exceed in the whole 5 cwt.

Sect. 33. This act shall not extend to hinder any person or persons from carrying or conveying an unlimited quantity of gunpowder, in such close-decked vessels and manner as hereinbefore is directed, from any ships or vessels lying below Blackwall, to any of the magazines for gunpowder so situate below Blackwall, or from such magazines to any ships or vessels lying below Blackwall, and going to any place beyond sea or coastwise, or from the floating magazines in the river Mersey to any ships or vessels going to any place beyond seas or coastwise, or from any ships or vessels arriving from any place beyond seas or coastwise to the said floating magazines.

Sect. 34. This act shall not extend or be construed to repeal or affect the provisions concerning gunpowder in and near the London Docks in 9 Geo. 4, c. 116, ss. 134 and 135 (local and personal).

Sect. 35. This act shall not extend or be construed to repeal or affect the provisions with respect to gunpowder magazines, gunpowder, or fireworks contained in any general or local police act which may be in force in any place in the United Kingdom.

Sect. 36. And whereas by the 2 & 3 Vict. c. 47, "for further improving the police in and near the metropolis," every superintendent or inspector belonging to the metropolitan police force is empowered as therein mentioned to enter any ship, boat, or vessel (except her Majesty's ships) in the river Thames, and the docks and creeks adjacent thereto, and to search the same for unlawful quantities of gunpowder, and to exercise the same powers of seizing, removing to proper places, and detaining all such unlawful quantities of gunpowder found on board any such ship, boat, or vessel, and the barrels or other packages containing such gunpowder, as are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by virtue of the said act of 12 Geo. 3, and by the 9 & 10 Vict. c. 25 (a), "for preventing malicious injuries to persons and property by fire or by explosive or destructive substances," any justice of the peace is empowered as therein mentioned to issue a warrant for searching in the day-time any place or vessel in which gunpowder or other explosive, dangerous, or noxious substance is suspected to be made or kept for the purpose of being used in committing an offence under that act; and it is enacted, that every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining all gunpowder, explosive, dangerous, or noxious substances found upon such search which he shall have good cause to suspect to be intended to be used in committing an offence under that act, and the barrels, packages, and cases in which the same shall be, the same powers which are given to persons searching for unlawful quantities of gunpowder under a warrant of a justice by the said 12 Geo. 3, c. 61:

a) This act is now repealed by 24 & 25 Vict. c. 95.

All powers given by the said acts of the 2 & 3 Vict. or 9 & 10 Vict., or by any act passed or to be passed in this present session of parliament, by reference to the said act of 12 Geo. 3, shall be construed as if this act had been referred to in the said acts of her Majesty, instead of the said act of George the Third. *Habeas corpus.* 23 & 24 Vict. c. 139.

Sect. 37. In the construction of this act the term "borough" shall mean and include any place for the time being subject to the provisions of the 5 & 6 Will. 4, c. 76; and in Scotland any royal burgh and any of the burghs or towns returning or contributing to return members to parliament; and in Ireland any place for the time being subject to the provisions of the 3 & 4 Vict. c. 108. *Meaning of the word "Borough."*

By the 24 & 25 Vict. c. 130, s. 1, all powers of granting licences by the said act (23 & 24 Vict. c. 136) given to justices of the peace at their general quarter sessions shall be transferred to and vested in the justices in petty sessions assembled, and the justices shall hold special petty sessions of the peace in their several divisions for granting such licences at such times as they think expedient; and all powers thereby transferred shall be exercised by the justices in petty sessions assembled within their respective divisions in the same manner in which the same are by the said act required to be exercised by the justices at their general quarter sessions, or as near thereto as circumstances will admit. *24 & 25 Vict. c. 130. Transfer of licensing powers.*

Sect. 2. The justices in each petty sessional division may, with the sanction of one of her Majesty's principal secretaries of state, regulate the mode in which applications for licences under this act are to be made, and make a scale of fees to be charged in respect of such licences. *Table of fees.*

Sect. 3. This act, so far as is consistent with the tenor thereof, shall be construed as one with the said act 23 & 24 Vict. c. 139. *Construction of act.*

Sect. 4. And whereas it is necessary for the manufacturers of safety fuzes to have and keep for the purpose of such manufacture large quantities of gunpowder: be it enacted, that such manufacturers shall be within and subject to all the provisions of sect. 18 of the said recited act, in like manner as the manufacturers of cartridges, fireworks, and rockets; and further, that it shall be lawful for such manufacturers of safety fuzes to keep exclusively for the use of such manufacture the respective quantities of gunpowder mentioned in the section 19 of the said act, in like manner as the same may be kept for the use of any mine, quarry, or colliery, but subject to all the restrictions and conditions mentioned and provided in the said section. *Section 18 of recited act to apply to manufacturers of safety fuzes.*

By the 25 & 26 Vict. c. 98, s. 1; sections 25 & 27 of the 23 & 24 Vict. c. 136, are to be construed and applied as if the word gunpowder therein mentioned included loaded percussion caps, ammunition, fireworks, fulminating mercury, or any other preparation or composition of an explosive nature.

Habeas Corpus.

I. *Habeas Corpus ad Subjiciendum*, 934.

II. *Habeas Corpus ad Deliberandum et Recipiendum*, and *Habeas Corpus cum Causâ*, p. 946.

III. *Forms*, p. 947.

As to the writ habeas corpus ad testificandum, see "*Evidence*," p. 95.

1. *Habeas corpus ad subjiciendum.*

I. Habeas Corpus ad Subjiciendum.

Herein—1st, *Of the Habeas Corpus Act, and other Acts relating to*, p. 934.

2nd, *Of the Writ, when granted, and proceedings on it*, p. 941.

1. THE HABEAS CORPUS ACT, AND OTHER ACTS, AS TO.

31 Car. 2, c. 2.

THE 31 Car. 2, c. 2, has been said to be the most highly remedial act which stands upon the statute book, (*Huntley v. Luscombe*, 2 B. & P. 539.)

Recital of expediency of amending the law as to writs of habeas corpus.

Sect. 1 recites, that great delays have been used by sheriffs, gaolers, and other officers to whose custody any of the king's subjects have been committed for criminal, or supposed criminal, matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts, to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been, and hereafter may be, long detained in prison, in such cases where, by law, they are bailable, to their great charges and vexation.

Writ to be returned in three days after service, and the body brought, if within twenty miles, &c.

Sect. 2. For the prevention whereof, and the more speedily relief of all persons imprisoned for any such criminal, or supposed criminal, matters; it is enacted, that whosoever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriffs, gaoler, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under officers, under keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under officers, under keepers, or deputies, shall within 3 days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment), upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and indorsed upon the said writ, not exceeding 12d. per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ; and bring, or cause to be brought, the body of the party so committed or restrained, unto or before the lord chancellor, or lord keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of 20 miles from the place or places where such court or person is or shall be residing; and if beyond the distance of 20 miles, and not above 100 miles, then within the space of 10 days; and if beyond the distance of 100 miles, then within the space of 20 days, after such delivery aforesaid, and not longer.

Charges for bringing up body.

Writ, how to be marked.

Proceedings thereon in vacation.

Sect. 3. And to the intent that no sheriff, gaoler, or other officer, may pretend ignorance of the import of any such writ; it is enacted, That all such writs shall be marked in this manner, *per statutum tricesimo primo Caroli Secundi Regis*, and shall be signed by the person that awards the same; and if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation

time and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process), or any one on his or their behalf, to appeal or complain to the lord chancellor or lord keeper, or any one of his Majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif; and the said lord chancellor, lord keeper, justices, or barons, or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorised and required, upon request made in writing by such person or persons, or any on his, her, or their behalf, attested and subscribed by 2 witnesses who were present at the delivery of the same, to award and grant an habeas corpus under the seal of such court whereof he shall then be one of the judges, to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable immediate before the said lord chancellor, or lord keeper, or such justice, baron, or any other justice or baron of the degree of the coif of any of the said courts; and upon service thereof as aforesaid, the officer or officers, his or their under officer or under officers, under keeper or under keepers, or their deputy, in whose custody the party is so committed or detained, shall, within the times respectively before limited, bring such prisoner or prisoners before the said lord chancellor or lord keeper, or such justices, barons, or one of them, before whom the said writ is made returnable, and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within 2 days after the party shall be brought before them, the said lord chancellor or lord keeper, or such justice or baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner, and nature of the offence, for his or their appearance in the court of King's Bench the term following, or at the next assizes, sessions, or general gaol-delivery of and for such county, city, or place where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable, as the case shall require, and then shall certify the said writ, with the return thereof, and the said recognizance or recognizances, into the said court where such appearance is to be made; unless it shall appear unto the said lord chancellor or lord keeper, or justice or justices, or baron or barons, that the party so committed is detained upon a legal process, order, or warrant out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for which by the law the prisoner is not bailable.

Sect. 4. If any person shall have wilfully neglected, by the space of 2 whole terms after his imprisonment, to pray a habeas corpus for his enlargement, such person so wilfully neglecting shall not have any habeas corpus to be granted in vacation time, in pursuance of this act.

Sect. 5. If any officer or officers, his or their under officer or under officers, under keeper or under keepers, or deputy, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the respective times aforesaid, or, upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of 6 hours after demand shall not deliver, to the person so demanding, a true copy of the warrant or warrants of commitment and

1. *Habeas corpus ad subjiciendum.*

81 Car. 2, c. 2.

Persons, neglecting two terms to pray a habeas, shall have none in vacation time.

Officer, how to be proceeded against for not obeying writ.

1. *Habeas corpus ad subjiciendum.*

31 Car. 2, c. 2.

Persons set at large not to be re-committed but by order of court.

Persons committed for treason or felony to be indicted the next term, or let to bail;

and tried the term, &c., after, or discharged.

Persons in custody for debts, &c.

Persons in custody in one prison, how removable to another.

detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall, for the first offence, forfeit to the prisoner or party grieved the sum of 100*l.*, and for the second offence the sum of 200*l.*, and shall and is hereby made incapable to hold or execute the said office; the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint, or information, in any of the King's courts at Westminster, wherein no essoign, protection, privilege, injunction, wager of law, or stay of prosecution by *non vult ulterius prosequi*, or otherwise, shall be admitted or allowed, or any more than one imparlance; and any recovery or judgment at the suit of any party grieved shall be a sufficient conviction for the first offence; and any after-recovery or judgment at the suit of a party grieved for any offence after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offence.

Sect. 6. For the prevention of unjust vexation by reiterated commitments for the same offence, enacts, that no person or persons, which shall be delivered, or set at large, upon any habeas corpus, shall, at any time hereafter, be again imprisoned or committed for the same offence, by any person or persons whatsoever, other than by the legal order and process of such court, wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned for the same offence, or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner, or party grieved, the sum of 500*l.*, any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

Sect. 7. If any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer, or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer, or general gaol-delivery, after such commitment, it shall and may be lawful to and for the judges of the court of King's Bench, and justices of oyer and terminer, or general gaol-delivery, and they are hereby required, upon motion to them made in open court, the last day of the term, sessions, or gaol-delivery, either by the prisoner, or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the judges and justices, upon oath made, that the witnesses for the king could not be produced the same term, sessions, or general gaol-delivery; and if any person or persons committed as aforesaid, upon his prayer or petition, in open court, the first week of the term, or first day of the sessions of oyer and terminer, and general gaol-delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer, or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

Sect. 8. Nothing in this act shall extend to discharge out of prison any person charged in debt or other action, or with process in any civil cause, but that, after he shall be discharged of his imprisonment, for such his criminal offence, he shall be kept in custody according to the law, for such other suit.

Sect. 9. If any person or persons, subjects of this realm, shall be committed to any prison, or in custody of any officer or officers what-

soever for any criminal, or supposed criminal matter (*a*), that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by habeas corpus, or some other legal writ; or where the prisoner is delivered to the constable, or other inferior officer, to carry such prisoner to some common gaol, or where any person is sent, by order of any judge of assize, or justice of the peace, to any common workhouse or house of correction, or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment aforesaid, make out and sign, or countersign, any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes, or signs, or countersigns, such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

Sect. 10. It shall and may be lawful to and for any prisoner and prisoners as aforesaid to move and obtain his or their habeas corpus, as well out of the High Court of Chancery, or court of Exchequer, as out of the courts of King's Bench or Common Pleas, or either of them; and if the said lord chancellor or lord keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of any of the courts aforesaid, in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of habeas corpus, by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner, or party grieved, the sum of 500*l.*, to be recovered in manner aforesaid.

Sect. 11. An habeas corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque ports, or other privileged places, within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

Sect. 12. And for preventing illegal imprisonments in prisons beyond the seas; it is enacted, that no subject of this realm that now is, or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal; and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment, in any of his Majesty's courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal, or countersign, any warrant or writing for such commitment, detainer, imprisonment, or transportation, or shall be advising, aiding, or assisting in the same, or any of them; and the plaintiff in every such action shall have judgment to recover his treble

1. *Habeas corpus ad subjiciendum.*

31 Car. 2, c. 2.

Habeas, out of what courts.

Penalty for denying the writ.

Counties palatine and privileged places.

No subjects shall be sent to foreign prisons.

The penalty.

(*a*) Custody under a commission of rebellion is not a custody for a criminal or supposed criminal matter. (*Cobbett v. Slowman*, 9 *Ec.* 633.)

1. *Habeas corpus ad subjiciendum.*

31 Car. 2, c. 2.

Persons receiving earnest upon contracts to be transported, excepted.

Persons convicted of felony, and praying transportation, excepted.

Offenders may be sent to be tried where their offences were committed.

Prosecutions for offences, within what time to be made.

After assizes proclaimed, no prisoner to be removed, but before judge of assize.

General issue, &c.

costs, besides damages, which damages so to be given, shall not be less than 500*l.*; in which action no delay, stay, or stop of proceeding, by rule, order of command, nor no injunction, protection, or privilege whatsoever, nor any more than one imparlance shall be allowed, excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; and the person or persons who shall knowingly frame, contrive, write, seal, or countersign, any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport, any person or persons contrary to this act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures limited, ordained, and provided, in and by the statute of provision and *premunire* made in the 16th year of King Richard II.; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them.

Sect. 13. Provided always, that nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.

Sect. 14. Provided always, that if any person or persons lawfully convicted of any felony, shall, in open court, pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas; this act, or anything therein contained, to the contrary notwithstanding.

Sect. 16. Provided also, that if any person or persons at any time resiant in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the king, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; anything herein contained to the contrary notwithstanding.

Sect. 17. No person or persons shall be sued, impleaded, molested, or troubled, for any offence against this act, unless the party offending be sued or impleaded for the same within 2 years, at the most, after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of 2 years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.

Sect. 18. And, to the intent no person may avoid his trial at the assizes, or general gaol-delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there, it is enacted, that, after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any habeas corpus, granted in pursuance of this act, but upon any such habeas corpus, shall be brought before the judge of assize in open court, who is thereupon to do what to justice shall appertain.

Sect. 19. Provided nevertheless, that after the assizes are ended, any person or persons detained may have his or her habeas corpus, according to the direction and intention of this act.

Sect. 20. If any information, suit, or action, shall be brought or exhibited against any person or persons, for any offence committed or to

be committed against the form of this law, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action.

Sect. 21. And, because many times persons charged with petty treason or felony, or as accessaries thereunto, are committed upon suspicion only, whereupon they are bailable or not according as the circumstances making out that suspicion are more or less weighty, which are best known to the justices of the peace that committed the persons, and have the examinations before them, or to other justices of the peace in the county; it is enacted, That where any person shall appear to be committed by any judge or justices of the peace, and charged as accessary before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment, that such person shall not be removed or bailed by virtue of this act, or in any other manner than they might have been before the making of this act.

The 56 Geo. 3, c. 100, s. 1, enacts, That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit) within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the barons of the Exchequer, of the degree of the coif, as well as for any one of the justices of one bench or the other; and where any person shall be so confined in Ireland, it shall and may be lawful for any one of the barons of the Exchequer, or of the justices of one bench or the other in Ireland; and they are hereby required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award, in vacation time, a writ of *habeas corpus ad subjiciendum*, under the seal of such court, whereof he or they shall then be judges or one of the judges, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any other judge of the court under the seal of which the said writ issued.

Sect. 2. If the person or persons to whom any writ of *habeas corpus* shall be directed according to the provisions of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall wilfully neglect or refuse to make a return or pay obedience thereto, he, she, or they shall be deemed guilty of contempt of the court, under the seal whereof such writ shall have issued; and it shall be lawful to and for the said justice or baron, before whom such writ shall be returnable, upon proof made by affidavit of wilful disobedience of the said writ, to issue a warrant under his hand and seal, for the apprehending and bringing before him, or before some other justice or baron of the same court, the per-

1. *Habeas corpus ad subjiciendum*.

31 Car. 2, c. 2.

Persons committed as accessaries before, to petty treason or felony, shall not be removed or bailed otherwise than before this act made.

56 Geo. 3, c. 100. Judges to issue, in vacation, writs of *habeas returnable immediately*, in cases other than for criminal matter, or for debt.

Non-obedience to such writ to be a contempt of court.

1. *Habeas corpus ad subjiciendum.*

56 Geo. 3, c. 100.

Punishment.

Judges to make writs of habeas issued in vacation returnable in court in next term.

Proviso.
Courts to make writs issued in term returnable in vacation.

Process of contempt may be awarded in vacation against persons disobeying writs of habeas in cases within 31 Car. 2, c. 2.

son or persons so wilfully disobeying the said writ, in order to his, her, or their being bound to the king's majesty, with two sufficient sureties, in such sum as in the warrant shall be expressed, with condition to appear in the court of which the said justice or baron is a judge, at a day in the ensuing term to be mentioned in the said warrant, to answer the matter of contempt with which he, she, or they are charged; and in case of neglect or refusal to become bound as aforesaid, it shall be lawful for such justice or baron to commit such person or persons so neglecting or refusing to the jail or prison of the court of which such justice or baron shall be a judge, there to remain until he, she, or they shall have become bound as aforesaid, or shall be discharged by order of the court in term time, or by order of one of the justices or barons of the court in vacation; and the recognizance or recognizances to be taken thereupon, shall be returned and filed in the same court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the court to be discharged; provided, that if such writ shall be awarded so late in the vacation by any one of the said justices or barons, that, in his opinion, obedience thereto cannot be conveniently paid during such vacation, the same shall and may, at his discretion, be made returnable in the court of which the said justice or baron shall be a justice or baron, at a day certain in the next term; and the said court shall and may proceed thereupon, and award process of contempt in case of disobedience thereto, in like manner as upon disobedience to any writ originally awarded by the said court; provided also, that if such writ shall be awarded by the court of King's Bench, or the court of Common Pleas, or court of Exchequer, in the said countries respectively, which last-mentioned court shall have like power to award such writs as the respective courts of King's Bench and Common Pleas in each of the said countries now have in term, but so late that, in the judgment of the court, obedience thereto cannot be conveniently paid during such term, the same shall and may, at the discretion of the said court, be made returnable at a day certain in the then next vacation, before any justice or baron of the degree of the coif, or, if in Ireland, before any justice or baron of the same court, who shall and may proceed thereupon in such manner as by this act is directed concerning writs issuing in and made returnable during the vacation.

Sects. 3 and 4. The judges are empowered to inquire into the truth of the facts stated in the return to the *habeas*, and to bail the prisoner on his recognizance to appear in term, &c., if the truth of the facts stated be doubtful, which recognizance is to be transmitted to the court with the affidavits used. The court are also empowered to inquire into the truth of those facts, and the truth controverted.

Sect. 5. The writ may run into counties palatine, the Cinque Ports, and other privileged places.

Sect. 6. The several provisions made in this act touching the making writs of *habeas corpus*, issuing in time of vacation, returnable into the said courts, or for making such writs, awarded in term time, returnable in vacation, as the cases may respectively happen, and also for making wilful disobedience thereto a contempt of the court, and for issuing warrants to apprehend and bring before the said justices or barons, or any of them, any person or persons wilfully disobeying any such writ, and, in case of neglect or refusal to become bound as aforesaid, for committing the person or persons so neglecting or refusing to gaol as aforesaid, respecting the recognizances to be taken as aforesaid, and the proceeding or proceedings thereon, shall extend to all writs of *habeas corpus* awarded in pursuance of the said act, 31 Car. 2, or 21 & 22 Geo. 3 (I), and hereinbefore recited, in as ample and beneficial a manner as if such writs, and the said cases arising

thereon, had been hereinbefore specially named and provided for respectively.

1. *Habeas corpus ad subjiciendum.*

56 Geo. 3, c. 100.

The court of Queen's Bench having decided in the case of *Anderson*, (30 *L. J. Q. B.* 129,) that the superior courts at Westminster had power to issue a writ of *habeas corpus ad subjiciendum* to any part of the dominions of the crown of England, the act 25 Vict. c. 20, was passed, which enacts:—

Sect. 1. No writ of *habeas corpus* shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion (a) of the crown where her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion.

Writ not to issue out of England into any colony, &c. having a court with authority to grant such writ.

2. THE WRIT, WHEN GRANTED, HOW OBTAINED, AND PROCEEDINGS ON.

In what cases granted.—Where a party is illegally or defectively committed and entitled to be discharged or bailed by a superior jurisdiction, he may, in every instance, obtain relief by this writ of *habeas corpus*, which it seems is the only remedy, as a writ of *certiorari* would be irregular. (*Com. Dig. Hab. Corp.* (C); *R. v. Bowen*, 5 *T. R.* 158; *ante*, *Certiorari*.)

When granted.

But the persons accused of treason or felony, *plainly expressed* (as to which, see *Commitment*), on the warrant or commitment, or as accessory, or on suspicion of being accessory before the fact to any petit treason or felony, or upon suspicion of such petit treason or felony, plainly expressed on the warrant, cannot be bailed on *habeas corpus*. (31 *Car. 2*, c. 2, s. 21; *ante*, p. 939.)

By the 16 & 17 Vict. c. 107, s. 290, the writ shall not be granted in favour of prisoners charged with smuggling and offences against the customs, unless the objections to the proceedings be stated.

The fact of the prisoner being too poor to afford the expenses of the *habeas*, will not induce the court or judge to dispense with the writ, and hear the prisoner on an application for his discharge without it. (*Ex parte Martins*, 9 *Dowl.* 194.)

The writ of *habeas*, though a writ of right, is not a writ of course; and the court or the judges are not bound, as of course and without any cause shown, to grant the writ in the first instance. It would be a strange inconsistency in the law if they were bound to do an act nugatory in itself; and that would be the case if, upon a view of the copy of the warrant of commitment, a writ of *habeas* was of course to issue, the only effect of which would be that upon the return to it the prisoner must be remanded. (*Hobhouse's case*, 3 *B. & Ald.* 420.)

If there be no warrant of commitment showing the crime, the writ will be granted and bail invariably accepted. (*R. v. Wilkes*, 2 *Wils.* 158; *R. v. Kendal*, 1 *Ld. Raym.* 65.)

Also in the case of delay of prosecution, the court will in general grant the writ and immediately discharge the prisoner on bail. (*R. v. Wyndham*, 1 *Str.* 4; *Sir R. Peyton's case*, 1 *Vent.* 346.)

Before the spring assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the summer assizes on the ground of B.'s illness. Before the summer assizes B. died, and at those assizes a true bill for the murder of B.

(a) The writ runs to the Isle of Man. (*Crawford's Case*, 18 *L. J. Q. B.* 225.) For it is not a foreign dominion of the crown within this section. *Quære*, whether the act

applies to a colony or foreign dominion where there is a court having power to issue process analogous to the writ of *habeas corpus*. (*Re James Brown*, 33 *L. J.* 193.)

1. *Habeas corpus ad subjiciendum.*

was found against A., and his trial was postponed at the instance of the prosecutor to the next spring assizes, on account of the illness of a material witness:—Held, that A. was not entitled to his discharge under the 7th section of the Habeas Corpus Act. (*Reg. v. Bowen*, 9 Car. & P. 509.)

Ill health is not of itself a sufficient ground to induce the court to interpose. (1 *Str.* 4, 5; 1 *Leach*, C. L. 117; but see 1 *Str.* 9.)

The court will not grant the writ to bring up a prisoner under sentence of imprisonment for a misdemeanor to enable him to show cause in person against a rule for a criminal information. (*R. v. Parkins*, 3 B. & Ald. 579, n.)

A writ of *habeas corpus* is not grantable in general where the party is in execution on a criminal charge after judgment on an indictment, according to the course of common law. (*Lees, ex parte*, E. B. & E. 828.)

And the court will not grant the writ to bring up a party in custody under an attachment, to enable him to move in person to set it aside. (*Ford v. Nassau*, 9 M. & W. 793.)

But where a defendant, charged with selling unstamped papers, was in custody, the court granted a *habeas corpus* for the purpose of enabling him to defend in person. (*Att.-Gen. v. Cleave*, 2 Dowl. 668.)

It is said that a person committed by rule of court cannot have this writ. (*Bac. Ab. Hab. Corp.* (B 4); *R. v. Flower*, 8 T. R. 324.)

When a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the caption was effected. (*R. v. Marks*, 3 East, 157; *Ex parte Krans*, 1 B. & C. 258.) In a case, where a party, against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad, and brought here in custody, and committed to prison for want of bail, the court refused to discharge her on *habeas corpus*, on the ground that she had been improperly apprehended in a foreign country. (*Ex parte Scott*, 9 B. & C. 446.)

The writ will not be granted to bring a party before the court, who has been committed by the House of Lords or Commons. (*Burdett v. Abbott*, 14 East, 1.)

Where A. was charged with a felony before three magistrates, who, upon hearing evidence, admitted him to bail, and afterwards upon additional evidence, committed him to gaol, it was held that A. was not entitled to a *habeas corpus* to be discharged out of custody. (*Ex parte Allen*, 3 N. & M. 35.) But in *Cross, ex parte*, 2 H. & N. 354, the court granted a rule calling upon a committing magistrate to show cause why a writ of *habeas corpus* should not issue in order to test the validity of the warrant.

The writ will not be granted to bring up a prisoner, in a county gaol, for the purpose of voting at the election of a member of parliament. (*Ex parte Jones*, 2 A. & E. 436.)

The court will not, it seems, grant it to remove a defendant out of custody, on a writ *de contumace capiendo*, for the purpose of doing penance before an ecclesiastical court, although the Lord Chancellor will. (*Ex parte Strong*, 5 Dowl. 213.)

Where there is a restraint of personal liberty of a feme covert, the court, in *favorem libertatis*, will grant the writ directed to the husband to bring up the body of his wife. (*Re Cochrane*, 8 Dowl. 630.)

But where a wife is voluntarily, and without restraint, absent from her husband, a court of common law cannot upon his application issue a writ of *habeas corpus* to bring up her body. (*Reg. v. Leggatt*, 18 Q. B. 781.)

As to a *habeas corpus* for the bringing up of infant children, see "*Bastards*," "*Children*."

Wilde, B., in the case of *Duley*, 2 F. & F. 258, granted a writ of

habeas corpus on the application of the sister of an orphan girl under 14 years of age, to remove her from an asylum where the applicant was denied access to her. - 1. *Habeas corpus ad subjiciendum.*

Where the father has been convicted of felony, the court will grant the writ, in order to give the mother the custody of an infant. (*Ex parte Bailey*, 6 Dowl. 311.)

It does not lie for an alien enemy. (*Case of the Three Spanish Sailors*, 2 W. Blac. 1324; *R. v. Schiever*, 2 Burr. 765.)

Application for a *habeas corpus ad respondendum* to take a prisoner (in custody upon a charge of felony) before the justices to answer another charge of felony, must be made to a judge at chambers. (*Reg. v. Isaacs*, 20 L. J. Q. B. 395.) In the case of *Reg. v. Day*, 3 F. & F., Mellor, J., decided that the court would not grant an application for a *habeas corpus* to remove a prisoner from gaol where he is undergoing sentence, in order to take him before a magistrate in another county to prefer another charge against him, but would grant a *habeas corpus* to bring him up for trial on a true bill being found against him at the assizes on that charge.

A female child, under the age of 16, has no right to withdraw herself from her father's control, and the court will, upon a writ of *habeas corpus*, order such child to be given up to her father, unless there be reasons assigned to satisfy the court that the father is not by law entitled to the custody of his child. (*Reg. v. Howes*, 30 L. J. M. C. 47.)

How obtained, and its form, &c.—In term time, the writ may be obtained in the courts of Chancery, Queen's Bench, Common Pleas, or Exchequer; in vacation from the lord chancellor, or one of the judges or barons. (31 Car. 2, c. 2, s. 2, ante, p. 934; 1 & 2 Vict. c. 45, ss. 1, 2.) How obtained, its form, &c.

A judge at chambers has power at common law to issue in vacation the writ, returnable before himself immediately. (*Reg. v. Batcheldor*, re *Canadian Prisoners*, 9 A. & E. 731.)

The application for the writ must be in writing, attested and subscribed by two witnesses: and a copy of the warrant of commitment must be produced before the court or judge, or an oath made that such copy was refused. (31 Car. 2, c. 2, s. 3, *Huntley v. Luscombe*, 2 B. & P. 530). There must be a legal right or an authority to apply for the writ on behalf of another. (*Child, ex parte*, 15 C. B. 238.)

The application must be supported by affidavit, upon which the court will exercise their discretion, whether or not the writ shall issue. (*Hobhouse's case*, 3 B. & Ald. 420; see 1 *Chit. Crim. Law*, 123, 124.) In general it should be supported by other affidavits than the prisoner's. (*R. v. Franklyn*, 1 Leach, 255.) The writ will not be granted to bring up a prisoner for the purpose of being discharged, on the ground that he is illegally in custody, unless there be an affidavit from himself, or it be shown that he is so coerced as to be unable to make one. (*In re Parker, case of Canadian Prisoners*, 5 M. & W. 32.)

The affidavit must not be in contradiction of a record; therefore where a prisoner was convicted at the Central Criminal Court for an offence committed at a place stated in the indictment to be within the jurisdiction of such court, but in fact was not, and an affidavit showing this fact was produced on motion for the writ of *habeas corpus*, the court refused the writ. (*Reg. v. Newton*, 3 W. R. 419, C. P.)

Nor will the writ be granted upon affidavits which would compel the court to review the decision of an inferior tribunal, as a conviction by justices under the Malicious Trespass Act. (7 & 8 Geo. 4, c. 30; *Re ———*, 5 W. R., Q. B. 607.)

The return to a writ of *habeas corpus* should be clear and unambiguous, and it will be held bad and evasive if doubtful parts of the return

1. *Habeas corpus ad subjiciendum.*—are not cleared up by proper affidavits. (*Reg. v. Roberts*, 2 F. & F. 272.) Upon a return to a writ of *habeas corpus*, affidavits are not admissible to show that the offence was not committed within the justices' jurisdiction. (*Smith, ex parte*, 27 L. J., M. C. 186.)

When the application is made to a judge or baron at chambers, he grants his *fiat*, upon which the prisoner's attorney may obtain the writ.

The writ must issue from the crown side of the court where the prisoner is in custody for a criminal matter. (*Easton's case*, 12 A. & E. 645.) But if the writ be issued out of the plea side, it is irregular only, and the irregularity may be waived by neglect to object to it in due time. (*Ib.*)

If a writ be granted on the ground that the party has been illegally committed by a magistrate, the judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate. (*Ex parte Hill*, 3 C. & P. 225.)

As to the form of the writ itself, in general, see 1 *Chit. Crim. Law*, 125-6. It must not be directed in the disjunctive. (*R. v. Fowler*, 1 Salk. 350.) It should be directed to the officer in whose custody the prisoner actually is. (*Godb.* 44; *Bac. Ab. Hab. Corp.* 66.) It must be subscribed by the judge awarding it. (*R. v. Roddam, Cowp.* 672.)

Service of writ, and proceedings on.

What to be done by gaoler, &c.

Service and Return, &c. of Writ, and Proceedings on.—We have already seen the provisions of the 31 Car. 2, c. 2, s. 2, which require the party detaining the prisoner in custody after the writ of *habeas* has been served on the gaoler, &c., or left at the gaol or prison (unless the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment), upon payment or tender of the charges of bringing up, and giving security for the charges of bringing back, the prisoner, if he shall be remanded, (55 *Geo.* 3, c. 53,) and that he will not make any escape, to make return of the writ, and bring the prisoner before the lord chancellor, or lord keeper for the time being, or the judges or barons of the court from whence the writ of *habeas corpus* issued, or the other magistrates before whom it was made returnable, and at the same time to certify the causes of the detainer, &c., within a certain time, under a heavy penalty for omission, *ante*, p. 934.

Service on gaoler.

We have seen that the 5th section of the statute of Charles (*ante*, p. 935) imposes a penalty on officers not obeying writs of *habeas corpus*. The construction of this section is, that, if the governor of the gaol be present, there is then no deputy or under-keeper on whom a service of the demand can be made; but if the governor be not present, then the deputy may be served; and if the deputy have no deputy, then in the absence of the deputy, service may be on the turnkey, or may be left at the gaol: for it is the duty of the governor to leave some person in his place. But if the gaoler be in the gaol, and accessible, the demand must be made on him; if he be not accessible, it may be on the deputy. And, at all events, the demand should be served in such a way that the person to whom it is delivered shall understand its nature; and where the principal is (as in this case he was) within the gaol, some pains should be taken that it should come to his hands. (*Huntley v. Luscombe*, 2 B. & P. 530.)

Service abroad.

It seems that service of the writ in France, although according to the forms of the French law, is bad. (*Re v. Rochfort*, 1 Jurist, 84.)

The return to writ.

When the body is returned by the officer to whom the writ is directed, he is to certify the day and cause of the caption and detainer, as in case of an excuse for not bringing the individual. (*Bushell's case, Vaugh.* 137; *Bac. Ab. Hab. Corp.* (B 9).) At the same time, the magistrate, in obedience to a *certiorari* usually issued from the crown office with the *habeas corpus*, returns the depositions upon which the commitment was founded, in order that the court may be furnished

with the means of judging in what way they should dispose of the prisoner. (*R. v. Marks*, 3 *East*, 157.) But where the party is in custody under the sentence of a court of competent jurisdiction to try his offence, it is sufficient to return that fact, without stating the particulars of the original charge against him; (1 *East*, 306); nor, if the commitment were made out by order of a court of record, is it necessary to set it forth in its precise language, as must be done when it is merely given under the hand of an individual magistrate. (*Clerke's case*, 3 *Salk.* 92; 1 *Chit. C. L.* 127.) It may be doubtful also whether it is necessary to return the cause of the *caption*. (See *Ex parte Scott*, 9 *B. & C.* 447.) The return will not be invalid for mere want of form, if it disclose a good cause of detainer. (*R. v. Bethel*, 5 *Mod.* 19.) The return should always show a good cause of detainer, and, in some cases, the proof. (*R. v. Nash*, 4 *B. & Ald.* 295; *R. v. Deybel*, *Id.* 243; *R. v. Souden*, *Id.* 294.)

Where a prisoner had been committed to prison upon a warrant not properly sealed it was held to be a good return to a writ of habeas corpus that a second warrant duly sealed had been lodged for his detention. (*Re Phipps*, 11 *W. R.* 730, *Q. B.*) So where a prisoner was lodged in gaol under a bad warrant of commitment in the nature of a conviction, a good warrant of commitment subsequently delivered to the gaoler, but before the rule for a habeas corpus has been obtained, is a good answer to such rule. (*Cross ex parte*, 26 *L. J. M. C.* 201; see also *Ex parte Smith*, 27 *L. J. M. C.* 186, where a warrant of commitment being had, a second warrant was allowed to be substituted for it as the return to a habeas corpus.)

An attachment may be granted for making an insufficient return to the first writ of habeas corpus, without issuing an alias and a pluries writ. (*Rex v. Winton*, 5 *T. R.* 89.)

So a total neglect to make the return may be prosecuted by attachment. (*R. v. Winton*, 5 *T. R.* 89.)

The truth of the return, in criminal cases, it has been said, cannot be controverted. (2 *Hawk. P. C.* 113.) It may in civil cases, as in an information in the exchequer for penalties for smuggling, &c. (*Ex parte Beeching*, 4 *B. & C.* 136.)

On habeas corpus, bringing up a party committed by justices for not finding sureties of the peace, the court will not hear affidavits controverting the facts alleged in the articles of the peace. (*Reg. v. Dunn*, 12 *Ad. & E.* 599.) And the stat. 56 Geo. 3, c. 100, s. 3, does not affect the practice in this respect. (*Ib.*)

So on habeas corpus, the warden of the Fleet set out in his return an order of the master of the rolls, which stated, that the prisoner, being brought to the bar of that court, was committed for contempt:—It was held that the prisoner could not be allowed to contradict by affidavit the statement, that he was brought to the bar of the court. (*In re Clarke*, 6 *Jur.* 757.)

At all events the return *primâ facie* imports verity, and, until it is impeached, need not be supported by affidavits or otherwise. (*Reg. v. Batcheldor*, 9 *A. & E.* 731.)

It was made a question in the above case of *R. v. Batcheldor*, but not decided, by what mode of procedure the return might be impeached, and its truth inquired into. It would seem that it may be controverted by affidavits. (*Ib.*) It seems that if the return be false, by an action at the suit of the prisoner, or by indictment. (*Anon. Salk.* 349; *Bac. Abr. Hab. Corp.* 6.) But an attachment will not be granted unless, perhaps, the return be wilfully false.

The court may in its discretion allow the return to a writ of habeas corpus to be amended after it has been returned and filed; (*Reg. v. Batcheldor, re Canadian Prisoners*, 9 *A. & E.* 731); and this without the consent of the prisoner. (*Re Clarke*, 6 *Jur.* 757.)

Upon the return, the prisoner's counsel may move to file it, and to

1. *Habeas corpus ad subjiciendum.*

Insufficient return.

Neglect to return.

Impeaching truth of return.

False return.

Amendment of return.

Filing return, &c.

2. *Habeas corpus ad deliberandum, &c.* have the prisoner called into court, and the return read, and after which the counsel may argue for the prisoner's discharge. The judge before whom the prisoner is brought is, within 2 days, to discharge him from imprisonment, on proper sureties for his appearance, if the cause be bailable, and if it be not, then he is to remand him.

Moving to discharge.

Remanding accused.

The Queen's Bench may remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, until they have determined to discharge or detain him; (*Bac. Abr. Hab. Corp.* 13); or may, during a reasonable time, bail the prisoner *de die in diem*, until they have come to a decision. (*R. v. Bethel*, 5 *Mod.* 19; *Bac. Abr. Hab. Corp.* (B. 13).)

If a *corpus delicti* appear on the depositions, (which the court always look to), (*R. v. Horner*, 1 *Leach*, C. C. 273), the court will remand the prisoner, though the warrant of commitment be informal. (*R. v. Marks*, 3 *East*, 162; *R. v. Greenwood*, 2 *Stra.* 1138; *R. v. Acton*, 2 *Stra.* 851; *Ex parte Krans*, 1 *B. & C.* 262; 2 *Dowl. & R.* 411, S. C.)

Where a warrant for the apprehension of a defaulter, under the 3 Geo. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and it was backed by justices of Lancashire and Gloucestershire, and on a return to a *habeas corpus* it appeared that the defendant was in custody on the warrant in Cambridge gaol, the court refused to discharge him, on a suggestion that he had been apprehended at Cheltenham, being clearly in legal custody at Cambridge. (*Ex parte Sharpe*, 9 *Dowl.* 513.)

Bail by justices of gaol delivery.

A prisoner confined in Newgate, for high treason in North America, who is only bailable before the Queen's Bench, or under a special commission, cannot be admitted to bail under the *habeas corpus* act, by justices of gaol delivery. (*R. v. Platt*, 1 *Leach*, 157; *Forbes*, 101; *R. v. Kimberley*, 2 *Stra.* 848.)

Bailing by magistrates in country.

Where the court think, upon hearing the affidavits on his behalf, that there is probable ground for his being discharged or bailed for a felony, if he be unable to defray the expense of being brought to Westminster for that purpose, the court will grant a rule to show cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them. (*R. v. Jones*, 1 *B. & Ald.* 209; *R. v. Massey*, 6 *M. & Sel.* 108.)

Recognizance, &c.

If the court or judge determine that the party shall be released from custody, he must thereupon enter into a *recognizance* to appear on his trial; and the writ, the return, and the recognizance must be certified into the court where the trial is to take place. (31 *Car.* 2, c. 2, s. 3, *ante*, p. 934.)

Bail.

The number, sufficiency, and amount of bail in general, have been already considered, *ante*, "Bail," and the observations there will, for the most part, apply here. The rule is, where the offence is *prima facie* great, to require good and ample bail. (*And.* 64; *Comb.* 6.) Moderation, nevertheless, is to be observed, and such bail only is to be required as the party is able to procure; for, otherwise, the allowance of bail would be a mere colour for imprisoning the party on the charge; (*R. v. Wilks*, 2 *Wils.* 159); nor will the court, at the instance of the prosecutor, increase the amount of the bail after they have once been taken. (*R. v. Salter*, 2 *Chit. Rep.* 109.) In bailing felonies, the court of Queen's Bench invariably requires sureties. (*R. v. Shaw*, 6 *D. & R.* 154.)

II. Habeas Corpus ad deliberandum et recipiendum, and Habeas Corpus cum Causa.

Habeas corpus ad deliberandum et recipiendum.

The writ of *habeas corpus ad deliberandum et recipiendum* lies to remove a prisoner to take his trial in the county where the offence was committed. (*Bac. Abr. Hab. Corp.* (A).)

By this writ a secretary of state may send a prisoner charged with having committed an offence in Ireland to that part of the kingdom to take his trial; or, if the crime was perpetrated in England, and he is taken in Ireland, may have him brought here by a similar process. (*Sedley v. Arbouin*, 3 Esp. 174, *where see form of warrant*). When a defendant is in execution at the Queen's suit, he cannot be brought up by *habeas corpus*, to be charged with an indictment, without notice to the attorney-general. (2 Barnard, 114).

The writ of *habeas corpus cum causa* may, in the court of Queen's Bench, be issued by the bail of a prisoner who has been taken upon a criminal accusation, in order to render him in their own discharge. (*Tidd, Pract.* 9th ed. 287.)

Habeas corpus cum causa.

Upon the return of this writ, the court will cause an *exoneretur* to be entered on the bail-piece, and remand the defendant to his former custody.

Exoneretur on bail-piece.

But the court of Common Pleas has no such jurisdiction. (*Bennett v. Kinnear*, 1 Bing. 221.)

III. Forms.

The Queen } In the Queen's Bench, Middlesex.
v. } Committed to the gaol at , in the county of , on sus-
C. D. & E. F. } picion of

(1). Affidavit of prisoner and solicitor to ground habeas corpus to admit prisoner to bail.

C. D., of &c., E. F., of the same place [labourer], and A. B., of &c., attorney for the prisoners, severally make oath and say; and first this deponent, C. D., for himself saith, that [here state the facts under which the supposed charge was made.] And these deponents severally say, that their characters, as well for honesty as industry, are well known to a great many respectable gentlemen and persons at T., for whom they have worked as for many years, as well as many other respectable persons of character, and many of whom have voluntarily stood forward and offered to become bail for their appearance at the next session, to take their trial upon any indictment which may be preferred and found against them: and lastly, these deponents severally say, they have both wives and large families to maintain by their daily labour, and therefore most humbly pray your lordship to grant them his Majesty's writ of habeas corpus, to bring them before your lordship to be bailed accordingly, and that your lordship will be pleased to order that a writ of certiorari may be issued to the committing justice, to produce before your lordship the examinations and depositions taken before him, which grounded the commitment. And this deponent, A. B., for himself saith, that he (this deponent) hath examined the annexed copy of commitment with the original commitment at the gaol at , and that the same is a true copy.

Sworn at the gaol at , in the county of , by the deponents, C. D. and E. F., the day of , 18—.

C. D.

E. F.

Before me, J. P., by commission.

Sworn by the deponent, A. B., at &c.

A. B.

Victoria, by the grace of God of the united Kingdom of Great Britain and Ireland, Queen, defender of the faith, To the keeper of our gaol of , at , or his deputy, greeting. (2). Writ of habeas corpus ad subjiciendum.

We command you, that you have before us at Westminster-hall, immediately after the receipt of this writ, the body of C. D., being committed and detained in our prison under our custody (as is said), together with the day and cause of the taking and detaining of the said C. D., by whatever name the said C. D. be called in the same, to undergo and receive all and singular such things as our court shall then and there consider of him in that behalf; and that you have then there this writ. Witness Thomas, Lord Denman, at Westminster, the day of , in the year of our reign. By the court, D.

*Harbours,
Docks, and
Piers.*

(3). Return to.

(4). Certiorari to two committing justices to certify information, examination, and depositions upon which prisoner was committed.

(5). Notice of bail at the judge's chambers.

[Indorsed on the writ as follows :]—*The execution of this writ appears in a certain schedule hereunto annexed.*

E. F., Keeper.

I, E. F., keeper of her Majesty's gaol of _____, at _____, in the writ to this schedule annexed named, do certify and return to our sovereign Lady the Queen, that, before the coming to me of the said writ, (that is to say), on &c., C. D., in the said writ also named, was committed to my custody, by virtue of a certain warrant of commitment, the tenor of which is as follows : [here insert a copy of the warrant.] And these are the causes of the detaining of the said C. D., whose body I have here ready, as by the said writ I am commanded.

E. F., Keeper.

[See the form and return, *ante*, title "Certiorari."]

Take notice, that C. D., now a prisoner in her Majesty's gaol of Maidstone, in and for the county of Kent, on a charge of [as the charge may be], will be brought up by virtue of her Majesty's writ of habeas corpus before the honourable Sir J. L., one of the justices of her Majesty's court of Queen's Bench, on &c., by o'clock in the forenoon of the same day, at [his chambers, in Rolls' Garden, Chancery Lane, London], or before such other of the judges of the said court of Queen's Bench, who shall be then present, in order to the said C. D. being admitted to bail for his personal appearance at the next session of oyer and terminer, and general gaol delivery, to be held in and for the county of K., then and there to answer all such matters and things as shall be objected against him in her Majesty's behalf ; and the names of the bail are E. F., of &c., G. H., of the same parish, gentleman, J. J., of &c., and K. L., of &c. Dated this &c.

Yours, &c., M. N., Attorney for the said C. D.

To A. B., of &c., the prosecutor, and also to J. P., of &c.

Harbours, Docks, and Piers.

10 & 11 Vict. c. 27.

Errors and omissions in plans, &c., may be corrected by justices, &c., who shall certify the same.

Certificate to be deposited.

The "Harbours, Docks, and Piers Clauses Act, 1847," is the general consolidation act for undertakings of that nature, and contains some provisions important to justices, which are therefore here inserted. After enacting (s. 6) that compensation for lands, &c. is to be given according to the Lands Clauses Consolidation Act, it provides (s. 7), that if any omission, misstatement, or wrong description shall have been made of any lands, or of the owners, lessees, or occupiers of any lands described on the plans or books of reference relating to the harbour, dock, or pier deposited in compliance with the standing orders of either house of parliament, or in the schedule to the special act, the undertakers, after giving 10 days notice to the owners, lessees, and occupiers of the lands affected by such proposed correction, may apply, in England or Ireland, to two justices, and in Scotland to the sheriff, for the correction thereof ; and if it appear to such justices or sheriff that such omission, misstatement, or wrong description arose from mistake, they shall certify the same accordingly, and they shall in such certificate state the particulars of any such omission, misstatement, or wrong description ; and such certificate shall, along with the other documents to which it relates, be deposited, in England and Ireland, with the clerk of the peace of the several counties in which the lands affected by such alteration are situate, and in Scotland with the sheriff clerk of such counties and with the schoolmasters of the several parishes in which such lands are situate, and with the town clerk if such lands be situate in a royal burgh ; and thereupon such plan, book of reference, or schedule shall be deemed to be corrected according to such certificate ; and the undertakers may make the works in accordance with such certificate, as if such omission, misstate-

ment, or wrong description had not been made. Sects. 9, 10, provide for the plans being deposited with the clerks of the peace for the inspection of the parties interested, and that certified copies may be received in evidence.

By s. 25 rates are not to be taken until the harbour, &c. is completed; and by s. 26, a certificate under the hand of the chairman of the quarter sessions in England or Ireland, and of the sheriff in Scotland, shall be conclusive evidence that the harbour, dock, or pier is completed and fit for the reception of vessels, or other the purpose intended, and such chairman or sheriff shall sign such certificate on proof being adduced to him of such completion and fitness.

Sect. 46. If any dispute arise concerning the amount of any rates due, or the charges occasioned by any distress or arrestment, by virtue of this or the special act, the person making such distress or using such arrestment may detain the goods distrained or arrested until the amount of the rates due or the charges of such distress or arrestment be ascertained by a justice, if in England or Ireland, and by the sheriff if in Scotland, who, upon application made to him for that purpose, shall determine the same, and award such costs to be paid by either of the parties to the other of them as he shall think reasonable, and such costs, if not paid on demand, shall be levied by distress or poinding and sale, and such justice or sheriff shall issue his warrant accordingly.

Sect. 74. The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

Sect. 75. If the amount claimed in respect of any such damage as aforesaid do not exceed 50l., such damage shall be ascertained, and the amount thereof shall, in England or Ireland, be recovered before two justices, and in Scotland before the sheriff; and in addition to the remedies hereby provided for the recovery of the same, the justices or sheriff before whom the same are recovered may cause the vessel or float of timber causing such damage, and any tackle and furniture thereof, to be distrained and kept until the amount of damages and costs awarded by them is paid, and if the same be not paid within 7 days after such distress or keeping may cause the property so distrained or kept, or any part thereof, to be sold, and out of the proceeds of such sale may pay the amount of damages and costs awarded by such justices or sheriff, and all the charges incurred by the distress, keeping, and sale of such property.

Sect. 76. If the owner of any vessel or float of timber make satisfaction for any such damage as aforesaid, wilfully or negligently done by the master or person having charge of such vessel or float of timber, or if the owner of any vessel or goods in any other case have been compelled to pay any penalty or costs by reason of any act or omission of any other person, the person who actually did such damage or who committed such offence shall repay to the owner of such vessel or such goods the amount of the damage or penalty and costs, together with the costs of the proceedings to enforce such payment; and if such damage or penalty respectively do not exceed 50l., the sum may,

*Harbours,
docks, and
piers.*

10 & 11 Vict. c. 27.
Certificate of completion of work.

Disputes concerning rates or charges occasioned by distress to be settled by a justice in England or Ireland, and in Scotland by the sheriff.

Owner of vessel answerable for damage to works.

As to the recovery of amount of damage to quays, &c.

Owner may recover damage from his servants

*Harbours,
docks, and
piers.*

10 & 11 Vict. c. 27.
Publication of
bye-laws.

in England or Ireland, be recovered before two or more justices, and in Scotland before the sheriff.

After providing for the confirmation of these bye-laws by the sessions or one of the judges, and notice of such allowance, it is enacted by s. 88, that the said bye-laws, when confirmed, shall be published in the prescribed manner, and when no manner of publication is prescribed they shall be printed; and the clerk to the undertakers shall deliver a printed copy thereof to every person applying for the same without charge, and a copy thereof shall be painted or placed on boards, and put in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier; and such boards, with the bye-laws thereon, shall be renewed from time to time as occasion shall require, and shall be open to inspection without fee or reward; and in case the said clerk shall not permit the same to be inspected at all reasonable times, he shall for every such offence be liable to a penalty not exceeding 5*l*.

Bye-laws to be
binding on all
parties.

Sect. 89. All bye-laws made and confirmed according to the provisions of this and the special act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same.

Proof of publica-
tion of bye-laws.

Sect. 90. The production of a written or printed copy of the bye-laws requiring confirmation by a judge of the superior courts or the court of quarter sessions or the sheriff, authenticated by the signature of the judge or of the chairman of the court or the sheriff who shall have approved of the same, and a written or printed copy of the bye-laws not requiring such confirmation, authenticated by the common seal of the undertakers if incorporated, or under the hands of the undertakers if not incorporated, or any two of them, shall be evidence of the existence and due making of such bye-laws in all cases of prosecution under the same, without proof of the signature of such judge or chairman or sheriff, or the common seal or signature of the undertakers; and with respect to the proof of the publication of any such bye-laws, it shall be sufficient to prove that a board containing a copy thereof was put up and continued in manner by this act directed, and in case of its afterwards being displaced or damaged that such board was replaced or restored as soon as conveniently might be, unless proof be adduced by the party complained against that such painted board did not contain a copy of such bye-laws, or was not duly put up or continued as directed by this act.

Recovery of
damages.

S. 91 provides for tender of amends, and payment into court, as in the Companies Clauses Act, *ante*, title "*Companies*."

Ss. 92, 94, and 95, are the same as 10 & 11 Vict. c. 16, ss. 104, 105, 106, respectively, and ss. 97, 98, contain the same provisions as to the access to the special act as s. 110 of that statute, *supra*, title "*Companies*."

Appointment of
constables.

Sect. 79. Any two justices may appoint such persons as shall be nominated for that purpose by the undertakers to be special constables within the limits of the harbour, dock, pier, and premises of the undertakers, and within one mile of the same; and every person so appointed shall be sworn in by any such justices duly to execute the office of a constable within the limits aforesaid, and when so sworn in shall have the same powers, protections, and privileges within the limits aforesaid, and shall be subject to the same liabilities as constables have or are subject to by the laws of the realm.

Sect. 80. Any two justices may dismiss any such constable from his office, and upon such dismissal all powers, protections, and privileges vested in such constable shall cease.

Bye-laws may be made for any of the purposes specified in s. 73, which embrace the regulations for the use of the harbour, &c., and the duties of all persons employed on the premises; and by s. 84, the undertakers may, by the bye-laws so to be made by them, impose

Bye-laws may be
enforced by un-
dertakers.

such reasonable penalties as they shall think fit, not exceeding 5*l.* for each breach of such bye-laws: Provided always, that such bye-laws shall be so framed as to allow the justices or sheriff before whom any penalty imposed thereby shall be sought to be recovered to order the whole or part only of such penalty to be paid. (See "*Bye-laws.*")

*Hard labour,
Punishment of.*

By the 24 & 25 Vict. c. 45, certain provisions were enacted enabling the promoters of any pier or harbour works to obtain provisional orders from the Board of Trade after enquiry made relative to the construction of the works, the levying of rates, &c., and as to the confirmation of such orders by parliament. 24 & 25 Vict. c. 45.

Hard Labour, Punishment of.

See Penal Servitude.

STAT. 3 Geo. 4, c. 114, intituled, "An act to provide for the more effectual punishment of certain offences, by imprisonment with hard labour," after reciting 53 Geo. 3, c. 162, enacts, "That from and after the passing of this act, whenever any person shall be convicted of any of the offences hereafter specified and set forth: that is to say,

3 Geo. 4, c. 114,
reciting 53 Geo. 3,
c. 162.

Persons convicted
of certain offences
may be sentenced
to imprisonment
with hard labour.

"Any attempt to commit felony.

"Any riot.

"Any misdemeanor for having received stolen goods knowing them to have been stolen.

"Being an utterer of counterfeit money, knowing the same to be counterfeit.

"Knowingly and designedly obtaining money, goods, wares, or merchandizes, bills, bonds, or other securities for money, by false pretences, with intent to cheat any person of the same.

"Keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house.

"Wilful and corrupt perjury, or of subornation of perjury.

"Having entered any open or inclosed ground with intent there illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, and having been there found at night armed with any offensive weapon.

"In each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct."

This statute, so far as it relates to the assaults therein mentioned, is repealed by the 9 Geo. 4, c. 31, now repealed by 24 & 25 Vict. c. 95; but its provisions were nearly re-enacted by the 24 & 25 Vict. c. 100. See *ante*, "*Assault.*"

24 & 25 Vict. c. 96, ss. 118, 119 (the Larceny Act), enacts, wherever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction; and where solitary confinement In larceny.

<i>Hawkers and pedlars.</i>	may be awarded, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at a time and not exceeding 3 months in any one year.
3 Geo. 4, c. 114.	There is also a similar clause, as to hard labour, in the 24 & 25 Vict. c. 97, ss. 74, 75, relative to offences against property, which see, tit. " <i>Malicious Injuries to Property.</i> "
Malicious injuries to property.	By 24 & 25 Vict. c. 100, s. 69, relative to offences against the person, hard labour may be added to the punishment of imprisonment.
In offences against the person.	There is also a similar clause in the 24 & 25 Vict. c. 97, s. 74, relative to the offences of robbery and stealing from the person, and connected therewith; and the offence of burglary and stealing in the dwelling-house.
Robbery, burglary, &c.	Also, a similar clause in the 24 & 25 Vict. c. 98, s. 52, relative to the punishment for forgery.
Forgery.	Also a similar clause in the 7 Will. 4 & 1 Vict. c. 88, s. 5, relative to the offence of piracy; which see under title " <i>Piracy.</i> "
Piracy.	Also, a similar clause in the 24 & 25 Vict. c. 97, s. 74, relative to the offence of burning or destroying buildings or ships.
Arson, and destroying ships, &c.	By 14 & 15 Vict. c. 100, s. 29, it is enacted, that whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.
Punishment for certain indictable misdemeanors.	This clause was repealed by 24 & 25 Vict. c. 95, as to indecent assaults.
Other cases.	See also the various titles of offences throughout this work, as to when hard labour may be imposed in other cases than the above.
Mode of enforcing.	As to the mode of enforcing this punishment, and how it is to be regulated, &c., see <i>ante</i> , tit. " <i>Gaols.</i> "

Hawkers and Pedlars.

[7 Geo. 3, c. 43; 48 Geo. 3, c. 84; 50 Geo. 3, c. 41; 52 Geo. 3, c. 108; 6 Geo. 4, c. 80; 1 & 2 Will. 4, c. 22; 22 & 23 Vict. c. 36; 24 & 25 Vict. c. 21; 27 & 28 Vict. c. 56; 28 & 29 Vict. c. 96, s. 18; 29 & 30 Vict. c. 64, ss. 11—14.]

Who are.

A **HAWKER** is an itinerant trader, who goes about from place to place, carrying with him, and selling, wares. By Dr. Johnson, a hawker is defined to be "one who sells his wares by proclaiming them in the street."

A **pedlar** is a hawker in small wares. By Dr. Johnson, he is defined to be "one who travels the country with small commodities."

Expediency of laws as to.

The trade carried on by persons keeping fixed establishments is, generally speaking, much more beneficial to the state than that of itinerant hawkers and pedlars. The character of the local trader is better known, and, therefore, there is greater security for the respectability of his dealings. He contributes also by the number of persons he employs, and the taxes he pays, much more than the itinerant trader, to promote the wealth and increase the prosperity of the country.

Hence has arisen the expediency of framing laws, which may operate as a restraint upon itinerant traders, may diminish their number, and, while they prevent any illegal practices, may, by obliging such persons to take out licences, and to submit to certain other regulations, be productive of revenue and profit. (See 2 *Chitty's Commercial Law*, 163).

We will divide our considerations under this title, as follows:—

- I. *Duties and Licences, &c., who subject, &c., to. &c.*, p. 953.
- II. *Certificate to obtain Licence*, p. 956.
- III. *Packages, &c., to be marked*, p. 957.
- IV. *Exemptions from taking out Licence*, p. 958.
- V. *Licensed Hawkers may set up any Trade*, p. 960.
- VI. *What Goods, Hawkers, &c., prohibited hawking*, p. 960.
- VII. *Selling by Auction prohibited, &c.*, p. 961.
- VIII. *Hawking contrary to, or without a Licence, or refusing to produce it*, p. 962.
- IX. *Hiring or lending Licences*, p. 963.
- X. *Forging Licences*, p. 964.
- XI. *Constables refusing to Assist, &c.*, p. 964.
- XII. *Recovery and Application of Penalties, Non-attendance of Witnesses*, p. 964.
- XIII. *Conviction—General Issue, &c.*, p. 966.
- XIV. *Appeal*, p. 967.
- XV. *Forms*, p. 968.

I. Duties, Licences, &c.

Stat. 50 Geo. 3, c. 41, intituled "An Act for placing the duties of hawkers and pedlars under the management of the commissioners of hackney coaches," repeals 9 & 10 Will. 3, c. 27, and all acts relating to duties on hawkers and pedlars.

By sect. 31, all the powers, rules, penalties, and forfeitures, exemptions, and things whatsoever, which, by stat. 9 & 10 Will. 3, c. 27, or by any other law now in force relating to the duties by that act granted, are provided, settled, or established, (other than so far as the same is or are inconsistent with, or repugnant to, this act, and other than in such cases for which different provisions are prescribed by this act), shall be exercised, and put in execution for the managing, raising, levying, recovering, and paying the several duties hereby granted, as fully as if all the said powers, &c., were repeated in this present act.

Stamp duties on licences to hawkers were imposed by 55 Geo. 3, c. 41, but new duties have been granted by 27 Vict. c. 18, which by 27 & 28 Vict. c. 16, s. 6, are made excise duties, and all the powers contained in the Stamp Acts relative to such duties may be enforced by officers of the excise, by whom the licences are now granted.

By the 27 Vict. c. 18, s. 8, licences were allowed to be granted to hawkers and pedlars for periods not exceeding 6 months, and by the same act new duties on licences to hawkers were imposed, and which are as follows:—

Duties, licences, &c.

Powers of 9 & 10 Will. 3, extended to this act.

Who to grant licences and duties thereon.

1. *Duties, licences, &c.*

On licences to hawkers and pedlars:

For and upon any licence to be taken out on or after the 1st August, 1864, by every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or otherwise, in Great Britain, carrying to sell or exposing to sale any goods, wares, or merchandise,

If such trading person as aforesaid shall travel and trade on foot, without any horse or other beast bearing or drawing burthen, and shall carry his goods, wares, or merchandise to and sell or expose for sale the same at other men's houses only, and not in or at any house, shop, room, booth, stall, or other place whatever belonging to or hired or occupied or used by him for that purpose in any town to which he may travel, the yearly duty of 2 0 0

And if such trading person shall travel or trade otherwise than as aforesaid, or with a horse or other beast bearing or drawing burthen, the yearly duty of 4 0 0

28 & 29 Vict. c. 96.
Hawkers' licences may be renewed before expiration, and new licence to stand in place of licence surrendered.

By 28 & 29 Vict. c. 96, s. 18, any hawker, pedlar, or petty chapman may apply for a renewed licence under the provisions of the statute in that behalf at any time before the expiration of his current licence; and on production and surrender of his current licence, and payment of the duty chargeable on a new licence, it shall be lawful for the officer to grant to him a renewed licence, and such officer shall insert therein the days of the commencement and termination of the period for which the same shall be granted, and the day of granting the same, and shall endorse thereon a memorandum of the date and place of surrender of the current licence; and such renewed licence, so endorsed, shall stand in the place of and be of the same force and effect as the surrendered licence during the unexpired term thereof, as well as for the whole of the term for which the renewed licence shall have been granted.

Hawkers' licences to expire on 31st March in every year (a).

By the 29 & 30 Vict. c. 64, s. 13, every licence granted in the United Kingdom to a hawker, pedlar, and petty chapman shall expire on the 31st day of March next following the grant of such licence; provided that it shall be lawful to grant a licence to a hawker, pedlar, and petty chapman for a period not exceeding 6 months, on payment of one half only of the amount payable for a yearly licence, and such half-yearly licence shall continue in force until the 31st day of March or the 30th day of September, whichever shall next follow the day of granting the same.

Sect. 14 provides for the renewal of hawkers' licences granted before the alteration in time of expiration was made.

Certificate for.

Before the licence is granted, it is necessary that the applicant should produce the certificate as required by sects. 12, 13. (See *post*, p. 956).

Duty payable at time of granting.

By 50 Geo. 3, c. 41, s. 10, the duties are to be paid at the time of receiving the licences.

Only one horse licence is required for hawkers, pedlars, and petty chapmen travelling with several beasts. (*R. v. Robotham*, 3 Burr. 1472.)

Exemptions.

By ss. 5 and 23, *post*, and 52 Geo. 3, c. 108, *post*, several persons are exempted from this duty. See the provisions in pages 958, 959. As to hawkers selling by auction, see *post*, pp. 955, 956.

Who are hawkers, &c., within the statute.

Every hawker, &c.—A single act of selling a parcel of silk handkerchiefs to a particular person, is not a sufficient proof that the party was such a hawker, pedlar, or petty chapman, as ought to take out the

(a) This act altered the dates for the expiration of hawkers' licences. The schedule of duties granted by

27 Vict. c. 18, superseded those imposed by 24 & 25 Vict. c. 21.

licence. (*R. v. Little*, 1 Burr. 609; and see *Paley*, 68; *R. v. Buckle*, 4 1. *Duties, licences, &c.*)

And every other trading person.]—These words extend to the case of all itinerant dealers who sell by retail, how extensive soever their transactions may be, and are not restrained to persons of the same description, as hawkers and pedlars who deal in a small way.

Thus, a licensed auctioneer, going from town to town in a public stage-coach, and sending goods by public waggons, and selling the same on commission by retail, or by auction at the different towns, is a trading person, within the above 6th section, and must take out a hawker's and pedlar's licence; (*R. v. Turner*, 4 B. & Ald. 510); *et per Abbott, C. J., S. C.*—"The question intended to be submitted to us by the sessions is, whether a licensed auctioneer, conveying goods by a public stage waggon, from place to place, and selling them on commission, is to be considered as a pedlar or trading person within the meaning of the 50 Geo. 3, c. 41. By sect. 6, it is enacted, 'that there shall be paid an annual duty of 4*l.* by every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise carrying to sell, or exposing to sale, any goods, &c. ;' and a further duty of 4*l.* in respect of every horse or other beast bearing or drawing burthen. Now, it appears to me that the appellant is a trading person within the meaning of this section. It has been urged that he is not a trader, but an agent selling the goods of others on commission. It is clear, however, that agents were meant to be included within the act of parliament; for section 23 contains an express exception of the particular agents therein mentioned. Now, that exception would be wholly unnecessary, if other agents were not meant to be included within the act. The defendant in this case is convicted for having no licence at all, and therefore I think the mode of travelling wholly immaterial. It has been said, that the conviction cannot be supported in its present form, inasmuch as the ground of it is, that the defendant travelled with horses. If it had been found as a fact in the case that the defendant had been convicted for want of a horse licence, I should have thought that the conviction could not be supported; for the horses, in respect of which he is bound to take out a licence, are those bearing or drawing burthen, or, in other words, carrying and drawing his goods. The defendant here was convicted for having no licence at all, and I think, therefore, the word 'horses' may be rejected. And, besides, in the way in which the present question is brought before us, we cannot look at the form of the conviction, but merely at the case submitted to us by the sessions. The order of sessions must, therefore, be affirmed."

So, a person travelling from town to town, and having packages of books, &c., weighing 1325 pounds, sent after him by the common stage waggon, and taking rooms at each town, and there selling such books, &c., by retail and by auction, is a trading person within 50 Geo. 3, c. 41; (*Dean v. King*, 4 B. & Ald. 517; *et per Abbott, C. J.*—"I am clearly of opinion, upon the facts of this case, that the defendant was a trading person, travelling from town to town, within the meaning of this act of parliament. The argument urged on the part of the defendant, arising out of the extent of his dealings, would go to show, that when the inconvenience to the resident tradesman is the greatest, no offence would be committed."

It seems also, that if a person travel from town to town with goods, and in each town employ an auctioneer resident therein to sell them for him, the person so travelling from town to town is a trading person within the meaning of the act. (*Attorney-General v. Tongue*, 12 Price, 51.)

Where the defendant was a servant to a tea-dealer in the county of

24. *Certificate to obtain licence.*

Worcester, who had been sent about the country by his master, showing samples and collecting orders, and afterwards carrying the parcels about for delivery, according to the orders.—The question was, whether this was hawking and pedling, so as to require a licence under the act. The court was of opinion that the act applied only to those who carried about the goods to be sold and delivered immediately, and not to those who carried about the goods for delivery pursuant to *previous* order and contract, otherwise a licence would be necessary to legalize the transactions of travellers for London houses. The act was not a carrying to sell, or exposing to sale, within the statute. (*R. v. Knight*, 10 B. & C. 734.)

Going from town to town, &c., and travelling either on foot or with horse, horses, or otherwise(a).]—These words form part of the description of all the persons previously named in the 50 Geo. 3, c. 41, s. 6, and therefore a conviction for hawking goods without a licence, merely describing the party as a hawker, was held insufficient if it did not also describe him as going from town to town, or to other men's houses, &c., as in the act. (*R. v. Little*, 1 Burr. 609.) In the case of the *Attorney-General v. Woolhouse* (1 Y. & J. 463), where a cabinet-maker, residing at Leicester, and having a shop there, sent goods to Ashby de la Zouch in a cart, which he accompanied on foot part of the way, and then went to Ashby de la Zouch by the mail, where he employed an auctioneer, and sold the goods by auction, it was held that he was a person travelling from town to town, within the act. It seems at one time to have been supposed, that, in order to subject himself to the penalties of the act, the defendant must have travelled with the goods he had to sell, but it is now settled that the mode of travelling is wholly immaterial. (*Supra*.)

24 & 25 Vict. c. 21.
Persons seeking
orders for goods
at other men's
houses to be
deemed hawkers.

By 24 & 25 Vict. c. 21, s. 9, persons going from town to town or to other men's houses carrying to sell or exposing to sale any goods, wares, or merchandise, or carrying and exposing samples or patterns of any goods, wares, or merchandise to be afterwards delivered, shall be deemed to be and shall be trading persons within the meaning of this act, and of the acts now in force relating to hawkers, pedlars, and petty chapmen, and shall be subject and liable to all the duties, provisions, regulations, pains, and penalties in and by the said acts imposed or contained, as if the same were herein repeated and re-enacted with reference to the persons and matters and things aforesaid: Provided that nothing herein contained shall extend to subject commercial travellers or other persons to the duties and provisions of the said acts by reason merely of their selling or seeking orders for goods, wares, or merchandise to or from persons who are dealers therein, and who buy to sell again, nor to persons licensed by the excise to deal in spirits, wine, or beer, or to the agents of such last-mentioned persons, nor to persons who are the real workers or makers of any goods or wares, or the servants of such persons seeking orders for any of such goods or wares.

II. Certificate to obtain Licence.

Hawkers before
licensed to pro-
duce certificate of
character.

By 50 Geo. 3, c. 41, s. 12, before any person or persons shall receive any licence to trade or travel as aforesaid, every such person or persons shall produce to the commissioner or commissioners for licensing and regulating hackney coaches, or their deputy or deputies appointed for licensing hawkers, pedlars, petty chapmen, and other trading persons as aforesaid, a certificate, signed by some one clergyman officiating within the parish, chapelry, or place, wherein such person so applying for such licence has his usual residence, and also

(a) This section is now repealed, but the words are nearly identical in the substituted clause 27 Vict. c. 18, Schedule, *ante*, p. 954.

by 2 reputable inhabitants of the said parish, chapelry, or place, attesting that the person so applying is of good character and reputation, and is a fit person to be licensed to exercise the trade of a hawker, pedlar, and petty chapman.

3. *Packages, &c. to be marked.*

By 24 & 25 Vict. c. 21, s. 6, any licence to a hawker, pedlar, and petty chapman under this act may be granted by any authorised officer of inland revenue upon the person applying for it producing either such certificate as is now by law required before receiving a hawker's licence, or a certificate under the hand of a justice of the peace for the county or place, or any superintendent or inspector of police of or for the district in which the officer shall reside, that the applicant for such licence under this act is a proper person to be so licensed.

A licence may be granted to a hawker on a certificate of a justice or an officer of police.

By 27 & 28 Vict. c. 56, s. 7, any licence to a hawker, pedlar, and petty chapman in Great Britain may be granted by any authorised officer of excise upon the person applying for it producing the certificate described in sect. 6 of the 24 and 25 Vict. c. 21, or in any former act: Provided always, that it shall be lawful to grant to any person who shall have taken out a licence as a hawker, pedlar, and petty chapman, a renewed licence upon the production and surrender of the licence last previously issued to him as such hawker, pedlar, and petty chapman, and without the production of any further or other certificate, so long as he shall continue to renew his licence immediately upon the expiration thereof.

A licence may be granted to a hawker upon the certificate required by law, and may be renewed on the production of a previous licence.

Sect. 13. The certificate, so to be produced, shall be in the form, or to the effect following:—

Form of certificate.

"We, A. B. the minister, and C. D. and E. F. being two householders residing at , in the parish, chapelry, or otherwise [as the case may be], of in the county of , do hereby certify, that G. H. hath been known to us for the space of years last past, and during all that time hath usually resided in the said parish, chapelry, or otherwise [as the case may be], of , and is a person of good character and reputation, and is a fit person to be licensed to exercise the trade of a hawker, pedlar, and petty chapman. Dated the day of ."

A. B. Minister.
C. D. }
E. F. } Householders.

III. Packages, &c., to be marked.

By 50 Geo. 3, c. 41, s. 14, every person to whom any such licence as aforesaid shall be granted under or by virtue of this act, and who shall trade with or under colour of such licence, shall cause to be written, painted, or printed, in large legible Roman capitals, upon the most conspicuous part of every pack, box, bag, trunk, case, cart, or waggon, or other vehicle or conveyance in which he or she shall carry his or her goods, wares, and merchandise, and of every room and shop in which he or she shall so trade, and likewise upon every hand-bill or advertisement which he or she shall give out, distribute, or publish, the words "licensed hawker," together with the number, name, or other mark or marks of distinction so written or printed upon his or her licence as aforesaid; and that every such person in any respect making default herein, shall forfeit, for every offence, the sum of 10l.

Packages of hawker to have the words "Licensed hawker," &c.

Penalty 10l.

Sect. 15. If at any time from and after the said 1st day of August, [1810], any person, other than to whom such licence shall have been so granted as aforesaid, shall write, paint, or print, or cause to be written, painted, or printed, or kept, or continue written, painted, or printed, upon any pack, bag, box, trunk, case, cart, waggon, or other vehicle or conveyance, for any goods, wares, or merchandize, or in any room or shop in which he or she shall sell or expose to sale, or keep for sale, any goods, wares, or merchandize, the words "licensed hawker," or, "licensed pedlar," or any other word or words to that effect; every person offending therein shall forfeit for each offence the sum of 10l.

Persons not licensed using such words.

Penalty 10l.

4. *Exemptions from taking out licence.*

Goods may be exposed to sale in public markets.

IV. *Exemptions from taking out Licence.*

By 50 Geo. 3, c. 41, s. 5, Nothing herein contained shall extend or be construed to extend to hinder any person or persons from selling or exposing to sale, any sorts of goods or merchandize, in any public mart, market (a), or fair, legally established within the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed, but such person or persons may do therein as they lawfully might have done before the making of this act; any thing herein contained to the contrary notwithstanding.

It was formerly supposed, that, under the above proviso, or a similar one contained in the 29 Geo. 3, c. 26, s. 17, hawkers might have exposed their goods to sale on market days, in any part of a market town, as they might have done before the passing of any of the hawker's acts. But in *R. v. Redfearne* (4 T. R. 273), it was decided that no hawker could expose goods to sale in any part of a market town but the public market place.

Proviso for sale of certain goods, &c.

Makers, &c., of goods, &c.

Particular trades.

Sect. 23 enacts, That nothing in this act shall extend to prohibit any person or persons from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or workers, or maker or makers of any goods, wares, or manufactures of Great Britain, or his, her, or their children, apprentices, or known agents or servants, usually residing with such real workers or makers only, from carrying abroad or exposing to sale, and selling by retail or otherwise, any of the said goods, wares, or manufactures, of his, her, or their own making, in any mart, market, or fair, and in every city, borough, town corporate, and market town, nor any tinkers, coopers, glaziers, plumbers, harness-menders, or other persons usually trading in mending kettles, tubs, household goods, or harness whatsoever, from going about and carrying with him or them proper materials for mending the same.

By 22 & 23 Vict. c. 36, s. 3, nothing in the 50 Geo. 3, c. 41, shall extend to hinder any such real worker or maker, or his children, apprentices, or known agents, or servants aforesaid, from carrying abroad or exposing to sale any of the said goods, wares, or manufactures of his own making, at any place whatever in Great Britain.

Thus extending the permission to a manufacturer to hawk his own manufactured goods to any place in Great Britain.

Foreign manufactures.

The manufactures of *Scotland* may be vended in England by wholesale, without a hawker's licence. (*Maxwell v. Mayer*, 3 Burr. 1314.)

Victuals

Victuals.—Barm or yeast is *victuals* within this exempting clause. (*R. v. Hodgkinson*, 10 B. & C. 74, et per Lord Tenterden, C. J.—“I think that the word *victuals* in the act comprises everything which constitutes an ingredient in the food of man, and all articles which, mixed with others, constitute food. Yeast or barm may not perhaps be necessarily used in the making of bread, but it generally is used, and I therefore am of opinion that it is within the exempting clause.”)

Workers or makers of goods.

Workers or makers of goods.—A person buying books in sheets and making them up, and then going from London into the country and selling them, is within the act, and is not exempted from penalties as the maker of the goods. (*Moore v. Edwards*, 2 Chit. Rep. 213.) *Clarke* moved to set aside a verdict obtained for the plaintiff in a *qui tam* action for penalties on the hawkers' and pedlars' act. The defendant bought

(a) That is, a market erected by *facto*. *Benjamin v. Andrews*, 27 L. grant and not merely a market *de J. M. C.* 310.

books in sheets, and made them up, and carried them from London into the country, and sold them at places where he did not reside; and it was contended that he was a maker of the goods within the exception in the hawkers' and pedlars' act. *Abbott, C.J.*—"This case comes within the act of parliament. A person going from London into the country is within the term 'travelling,' and the defendant is not within the exception, as a maker of the commodity. Rule refused."

4. *Exemptions from taking out licence.*

It has also been decided at *Nisi Prius*, that this exemption as to the makers of goods, extends beyond mere handicraftsmen, and that it comprehends within it wholesale tradesmen vending their own manufactured goods by means of their known servants or agents usually residing with them. (*R. v. Thomas, Lancaster Sum. Ass. 1827; Hullcock, B.*) And this decision has since been confirmed by the case of *R. v. Farraday* (1 B. & Ad. 275), in which it was decided, that manufacturers on a large scale employing workmen on premises where they do not reside, and doing no manual labour themselves, are makers within the exemption.

Agents or servants usually residing with such real worker, &c.—The privilege extended by the 23rd section to sales by the children, apprentices, or known agents, or servants, usually residing with such real worker or maker, applies to such agents or servants only as reside in the same house with the makers of the goods, as part of his family. (*R. v. Mainwaring, 10 B. & C. 66, et per Lord Tenterden, C.J., S.C.*—"The 23rd section exempts from the operation of the act 'the real worker or maker of any goods, or his or their children, apprentices, or known agents or servants usually residing with such real workers.' The word *residing* may undoubtedly vary in its import, according to the subject to which it is applied. The sense of that word, however, is explained in this section, by the words with which it is accompanied. The words 'children or apprentices' apply to persons residing with their parents or masters, as part of their family, in the same house. That being so, I think we ought to understand the other words 'agents or servants' to apply to such agents and servants as reside in the same house with their employers, as members of their family. Here the defendant was not a member of the maker's or manufacturer's family; he had a separate dwelling of his own. If we were to hold that the words imported only a residence in the same town, the consequence would be, that the exemption would apply to a case where a manufacturer and his agent lived on the western side of Temple Bar, but not to a case where one of them lived on the western side and the other on the eastern side of Temple Bar."

Agents or servants residing with maker.

In the case of *R. v. Farraday* (1 B. & Ad. 275), where the servant of manufacturers on a large scale not residing with them, travelled with goods of the manufactory to a town, where he sold them in a public room, having advertised the goods as those of his employers, to be disposed of by him according to their instructions, and one of the proprietors was present, gave directions, noted the purchases, and received money, but no one was informed who he was; it was held that the seller, though not licensed, was exempt from any penalty, the sale being substantially a sale by the master.

By stat. 52 Geo. 3, c. 108, s. 1, No person, being a wholesale trader in lace, in woollen, linen, silk, cotton, or mixed goods, or any of the goods, wares, or manufactures of Great Britain, and selling the same by wholesale, shall be deemed or taken to be a hawker, pedlar, or petty chapman, within the intent and meaning of the [stat. 50 Geo. 3, c. 41], or any other act relative to hawkers, pedlars, or petty chapmen, or of any or either of them; and that all and every such person and persons, his, her, or their apprentices, servants, or agents, selling by wholesale only, shall go from house to house, and from shop to

No wholesale trader deemed hawker, nor shall he or his servants be liable to penalties for going from house to house, selling goods by wholesale only.

6. *What goods hawkers, &c. prohibited hawking.*

Carrying about coals in carts, &c.

shop, to any of their customers who sell again by wholesale or retail, without being subject or liable to any of the penalties or forfeitures contained in the said recited act, or in any of the said acts touching hawkers, pedlars, and petty chapmen; any thing in any of the said acts contained to the contrary notwithstanding.

Sect. 2 enacts, That nothing in the said statute [50 Geo. 3, c. 41], contained, shall extend to prohibit any person or persons from carrying about coals in carts, or on horses, mules, and asses, and selling the same by retail, or subject any such person or persons to any duty, penalty, or forfeiture imposed by the said recited act.

V. Licensed Hawkers may set up any Trade.

Hawkers duly licensed may set up trade in place of residence.

By 50 Geo. 3, c. 41, s. 22, It shall be lawful for any person or persons who, on the 1st day of May, was or were duly licensed to trade as hawkers and pedlars, to set up, occupy, use, or exercise any craft, mystery, or occupation, used or occupied within this realm, in any place where they shall be resident inhabitants, although they shall not have been brought up in such craft, mystery, or occupation, 7 years as apprentices (a); and also to set any person to work in such craft, mystery, or occupation, although such person shall not have been apprentice therein as aforesaid, any penalty, matter, or thing contained in [5 Eliz. c. 4], to the contrary notwithstanding; and that if any such person or their wives or children shall be prosecuted for using or exercising any such craft, mystery, or occupation, in any city, town, or place, and shall make it appear that they had such licence as aforesaid, they shall, upon the general issue pleaded, be found not guilty, in any action, bill, plaint, information, or indictment for such cause exhibited against him, and in all cases where costs are allowed, such persons so acquitted shall be entitled to and shall receive double costs; and that no such persons, their wives, or children, during the time they shall use and exercise such craft, mystery, or occupation, in any parish or place, shall be removeable therefrom to his, her, or their last legal place of settlement, until such person or persons shall become actually chargeable to such parish or place, any law not* (b) in being, relative to the settlement of the poor, to the contrary thereof notwithstanding. By 35 Geo. 3, c. 101, no person can be removed until “*actually chargeable*.”

General issue.

Double costs.

The hawker's licence does not give the privilege of selling goods in a borough where, by a bye-law made pursuant to charter and ancient custom, strangers are not permitted to trade. (*Simson v. Moss*, 2 B. & Ad. 543.)

The provision as to double costs is repealed by the 5 & 6 Vict. c. 97, s. 2; and instead of double costs, the defendant will be entitled to a full indemnity against them.

VI. What Goods Hawkers, &c. prohibited Hawking.

Hawkers not to deal in smuggled goods.

By 50 Geo 3, c. 41, s. 16, If any hawker, pedlar, petty chapman, or other trading person as aforesaid, shall, from and after the said 1st day of August, be convicted of knowingly dealing in, vending, or selling any kind of smuggled, contraband, or prohibited goods, wares,

(a) See also the stat. 54 Geo. 3, c. 96, tit. “*Apprentices*.” It repeals so much of the 5 Eliz. c. 4, as restrained “persons” from exer-

cising any art, unless they had served an apprenticeship of seven years, &c.

(b) Query, “*now in being*”?

or merchandise, or knowingly dealing in, vending, or selling any goods, wares, or merchandise fraudulently or dishonestly procured, either by themselves or through the medium of others, with their privity and knowledge, every such hawker, pedlar, petty chapman, or trading person, shall from and after such conviction, forfeit his or her licence, and for ever thereafter be incapable of obtaining or holding any new licence, or dealing, trafficking, or trading under the same, and that over and above all such forfeitures and incapacities, fines, and penalties to which he or she is or shall be by law subject and liable, for such illicit and illegal trafficking and dealing.

See also, tit. "Excise," under which it will be found, that hawkers and pedlars are prohibited from dealing in particular articles, and amongst others, in spirits, tobacco, snuff, &c.

24 & 25 Vict. c. 21, s. 8. And whereas persons licensed under the laws of excise to sell tea and coffee are restricted in the sale thereof to premises of which entry is required to be made with the officers of excise; and it is expedient to allow such licensed persons who shall also be duly licensed under the acts in force relating to hawkers, pedlars, and petty chapmen in Great Britain to carry and expose for sale and sell tea or coffee in the course of their trading as such licensed hawkers, pedlars, and petty chapmen: Be it enacted, that no person who shall be duly licensed under the laws of excise to sell tea or coffee, and also duly licensed as a hawker, pedlar, and petty chapman, shall be subject to any penalty or forfeiture for selling tea or coffee elsewhere than on such entered premises as aforesaid, by reason or on account of his selling tea or coffee in the regular course of his trading as such hawker, pedlar, or petty chapman, duly licensed as aforesaid, anything in any act relating to the excise to the contrary notwithstanding.

7. *Selling by auction.*

50 Geo. 3, c. 41.

24 & 25 Vict. c. 21
Licensed hawkers,
&c., may carry
and sell tea and
coffee under an
excise licence.

VII. Selling by Auction.

By 50 Geo. 3, c. 41, s. 7, From and after the said 1st day of August [1810], it shall not be lawful for any hawker, pedlar, petty chapman, or any other trading person or persons going from town to town, or to other men's houses, and travelling either on foot or with horse or horses, either by opening a room or shop, and exposing to sale any goods, wares, or merchandise by retail in any town, parish, or place, (such person not being a householder there, or the same not being an usual place of his or her abode), or by any other means or device to vend or sell, either by himself, or herself, or by any auctioneer (whether licensed or not), broker, appraiser, agent, servant, or other person on his or her behalf, any goods, wares, or merchandise whatsoever, by outcry, knocking down of hammer, candle, lot, parcel, or any other mode of sale at auction, or whereby the best or highest bidder is or shall be deemed to be the purchaser; and that every person and persons so vending or selling contrary to such prohibition as last aforesaid, shall forfeit and pay for every offence the sum of 50*l.*, to be recovered and applied as hereinafter mentioned. See s. 24, *post*, p. 904.

This section was repealed by 29 & 30 Vict. c. 64, s. 12, so far as regards the selling by auction, by any trading or other person duly licensed as an auctioneer.

A licensed hawker may sell by retail in a hired room, where he is not a householder, provided such selling be not by outcry, &c. or some mode of sale at auction. (*Allen v. Sparkhall*, 1 B. & Ald. 100.) *Et per* Lord Ellenborough, C. J., S. C.—“On looking at the 7th sect., I think that the words ‘by outcry, &c., or any other mode of sale at auction,’ govern the meaning of the whole. If the clause had stopped at the words ‘any other means or device,’ an argument might have been raised, but the general scope is laboriously confined to outcry and sale

Hawkers (not
being residents)
selling by auction

What an offence
within act.

8. *Hawking without licence, &c.*

50 Geo. 3, c. 41.

Form of information.

at auction." *Et per Abbott, J.*—"The clause is prohibitory, but the prohibition is confined to persons of a certain description. A hawker is one description of person, a person who sells by retail is another, and neither must sell by auction." (See 1 *Law. Mag.* 340.)

As to what auctioneers and persons are hawkers within the statute, and subject to the penalties, &c., see *ante*, p. 955.

It is not necessary in an information for penalties, under this 7th section, to state that the defendant sold by auction, &c., by opening a room or shop, and exposing to sale his goods, &c., by retail. (*Attorney-General v. Woolhouse*, 1 *Y. & J.* 463.)

VIII. Hawking contrary to, or without a Licence, or refusing to produce it.

Trading contrary to licence.

By 50 Geo. 3, c. 41, s. 17 (a), If any such hawker, pedlar, or petty chapman, or other trading person so travelling as aforesaid, [*ante*, p. 954], shall from and after the said 1st day of August [1810], trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by such licence, such person shall, for each and every such offence, forfeit the sum of 10*l.*, to be recovered and applied as herein-after mentioned; and that if any person trading under or by virtue of any licence to him or her granted as aforesaid, upon demand made by any person or persons authorised or appointed to demand any such licence by the commissioners for licensing hawkers, pedlars, and petty chapmen for the time being, or any 2 of them, under their hands and seals, and upon producing or showing such authority or appointment to such person so trading as last aforesaid, or upon demand made by any justice of the peace, mayor, constable, or other officer of the peace of any county, riding, division, town corporate, borough, or place, where he or she shall so trade, or by any officer of the customs or excise, or by any person to whom such hawker, pedlar, or petty chapman shall offer any goods to sale, shall refuse to produce and show his or her licence for so trading as aforesaid, or shall not have his or her licence ready to produce and show unto such person authorised or appointed as last aforesaid, or unto such justice of the peace, mayor, constable, or other officer of the customs or excise, that then the person so refusing, or not having his or her licence ready to produce and show as aforesaid, shall forfeit 10*l.*, to be recovered and applied as herein-after mentioned, and for nonpayment thereof shall suffer as a common vagrant, and be committed to the house of correction. (*See Vagrants.*)

Persons trading without a licence, or refusing to produce it, may be detained and taken before a justice.

Sect. 20. It shall be lawful for any person or persons whatsoever to seize and detain any such hawker, pedlar, petty chapman, or other trading person as aforesaid, who shall be found trading without a licence contrary to this act, or who being found trading shall refuse or neglect to produce to such person or persons a licence according to this act, after being required so to do for a reasonable time, in order to give notice to a constable, headborough, tithingman, or other peace officer or officers, who are hereby required to carry such person so seized, unless they shall in the mean time produce their respective licences, before some one of his Majesty's justices of the peace of the county or place where such offence or offences shall be committed, which said justice of the peace is hereby authorised and strictly required to examine into the fact or facts charged; and upon the proof, either by confession of the party offending, or by the oath of one or more credible witness or witnesses, (which

Trading without licence.

(a) A person who goes from the town in which he lives, and takes a room in another town, for the sale of goods brought from his residence, is

a hawker within the 50 Geo. 3, c. 41, s. 17. (*Manson v. Hope*, 31 *L. J. M. C.* 191.)

the said justice is hereby empowered to administer), that the person so brought before him had so traded as aforesaid, and no such licence being produced by such offender before the said justice, to convict the offender so trading without a licence, and thereupon it shall be lawful for such justice, and he is hereby required by warrant under his hand and seal, to cause the said sum of 40^l.^{*} to be levied by distress and sale of the goods, wares, or merchandise of such offender or offenders, or of the goods[†] which such offender or offenders shall be found trading as aforesaid, rendering the overplus, if any be, to the owner or owners thereof, after deducting the reasonable charges for making such distress, and out of the said sale to pay the said respective penalties and forfeitures aforesaid, and in the mean time to commit such offender to the common gaol or house of correction for the county, riding, division, city, liberty, town, or place where the said offence shall be committed, there to remain until the said penalties and forfeitures, and the reasonable charges of taking the said distress, shall be levied by such distress and sale as aforesaid, or until the same shall be otherwise paid or satisfied by such offender.

9. *Hiring or lending licences.*

50 Geo. 3, c. 41.

^{*} *Sic.* See note infra.

[†] *Sic.* Query, whether the word "with," is not omitted.

29 & 30 Vict. c. 64, s. 11, enacts, That if any person shall, in the United Kingdom, trade or do any other act for which such person is required by the acts in force in Great Britain and Ireland respectively to be licensed as a hawker, pedlar, or petty chapman, without having a proper licence in that behalf, or if any person who shall trade or do any such other act as aforesaid shall neglect or refuse to produce to any person who shall demand the same a proper licence granted to him as a hawker, pedlar, or petty chapman, and then in force, he shall forfeit the penalty of 10^l., which shall be an excise penalty, and be over and above any other penalty to which such person may be liable under any act now in force; and it shall be lawful for any person to seize and detain the offender, and to deliver him to any officer of excise, or to any constable or police officer, who is hereby required to take such offender before a justice of the peace for the county or place wherein the offence shall have been committed, and such justice shall, on the confession of the party, or upon due proof on oath made of the offence, convict such offender in the penalty aforesaid, or in some mitigated amount not less than one-fourth part thereof; and if the penalty imposed be not immediately paid the justice shall, by warrant under his hand, commit the offender to hard labour in the house of correction for the said county or place for the space of one calendar month (to be reckoned from the day of the commitment), unless the penalty shall be sooner paid: Provided always, that where the person offending shall not be detained and proceeded against in the manner herein directed the said penalty of 10^l. may be recovered by information in the same manner as any other excise penalty.

29 & 30 Vict. c. 64. Penalty on persons hawking goods without licence in the United Kingdom.

IX. *Hiring or lending Licences.*

By 50 Geo. 3, c. 41, s. 19, In case any person shall let out, or hire, or lend any licence to him or her granted as aforesaid, or shall trade with or under colour of any licence granted unto any person whatsoever, or of any licence in which his or her own real name shall not be inserted as the name of the person to whom the same is granted, the person letting out to hire or lending any such licence, and the person so trading with or under colour of any licence granted to any other person, or any licence in which his or her own real name shall not be inserted, as the name of the person to whom the same is granted, shall each of them forfeit the sum of 40^l., to be recovered and applied as hereinafter mentioned; and in case any person shall be convicted or have judgment against him for lending his or her licence to any other person or

Hiring or lending licence.

12. *Penalties, recovery of, &c.*
—*non-attendance of witnesses.*

What not an offence within act.

persons contrary to this act, such his or her licence shall be from henceforth forfeited and void, and he or she shall be utterly incapable of having any licence again granted to him or her to trade as aforesaid; provided always, that nothing herein contained shall subject to the said penalty any servant travelling for a licensed master, with the licence of such master, and for his benefit, or any licensed master sending such servant to travel with such licence.

A hawker who gives his licence to be used by his servant employed to sell goods on his account, and he receiving the profits, is not liable to the penalty, as for *letting to hire* or *lending* his licence. (*Hodgson q. t. v. Flower*, 2 *Campb.* 290.) This was an action of debt on stat. 29 Geo. 3, c. 26, s. 13, to recover the penalty of 40*l.* from the defendant for *letting out to hire and lending* his licence to one B. W. The second count was for unlawfully *lending* the licence. It appeared that W. was the defendant's servant, and was in the habit of going about selling coals for his master, and received 4*s.* 6*d.* a chaldron upon the coals he sold. And it was held by Lord *Ellenborough*. C. J., that no forfeiture was incurred by the defendant, and that an action could not be maintained against a master for sending out a servant with a licence. And he cited in point *Chamberlain q. t. v. Hill* (2 *Campb.* 292).

X. Forging Licences.

Forging or using forged licence.

By 50 Geo. 3, c. 41, s. 18, "If any person or persons whatsoever shall forge or counterfeit any licence or licences by this act directed to be granted, or travel with, or produce or show any such forged or counterfeit licence or licences, for any of the purposes aforesaid, every such person shall, for every such offence, forfeit the sum of 300*l.*, to be recovered and applied as hereinafter directed.

XI. Constables refusing to assist, &c.

Constables refusing to assist.

Sect. 21. If any constable, headborough, or tithing-man, or other officer or officers of the peace, shall refuse or neglect, upon due notice, or on his or their own view to be aiding and assisting in the execution of this act, being thereunto required, and each and every such officer or officers being thereof convicted upon his confession, or by the oath of one or more credible witness or witnesses, before any justice of the peace for the county or place where the offence shall be committed, shall forfeit for each and every such offence the sum of 10*l.*, to be recovered and applied as hereafter mentioned.

The duty of constables in seizing, &c., persons, &c., selling spirits, will be found under tit. "*Excise.*"

XII. Penalties, Recovery and Application of—Non-attendance of Witnesses.

Penalties above 20*l.*, where to be recovered.

Sect. 24. All pecuniary penalties which shall be incurred under this act of a greater sum than 20*l.*, shall be recovered, together with costs of suit, in any of his Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoign, protection, privilege, or wager of law, or more than one imparlance shall be allowed; and one moiety of every such penalty or forfeiture shall belong to his Majesty, his heirs and successors, and the other moiety thereof to the person or persons who shall inform or sue for the same.

Sect. 25. In all cases where the pecuniary penalty by this act imposed does not exceed the sum of 20*l.*, it shall be recoverable before one of his Majesty's justices of the peace of the county, riding, shire, division, city, liberty, town, or place, wherein the offence shall be committed, on proof of the offence, either by voluntary confession of the party or parties accused, or by the oath of one or more credible witness or witnesses, and one moiety of every such last-mentioned penalty shall belong to his Majesty, his heirs and successors, and the other moiety to the informer or informers prosecuting for the same, and, in case of non-payment, the said justice by warrant under his hand and seal, shall cause the same to be levied by distress and sale of the offender's goods and chattels, or of the goods and chattels with which such offender shall be found trading; and the overplus of the money raised, after deducting the penalty and expense of the distress and sale, shall be rendered to the owner, and shall also commit the offender to the prison of such county, shire, division, city, liberty, town or place, there to remain until the said penalties, and the reasonable charges of taking the said distress, shall be levied by such distress and sale as aforesaid, or until the same shall be paid or satisfied by such offender; and it shall be lawful for any such justice of the peace, by his warrant, to cause such offender to be apprehended and brought before him to answer to any charge or complaint for any such penalty, and to commit such offender to prison as aforesaid, until the hearing of such charge or complaint, unless he or she shall and do enter into a recognisance before such (c) justice, with two sufficient sureties in a sufficient sum, to be ordered by such justice, to appear at the hearing of such charge or complaint.

12. *Penalties, recovery of, &c. —non-attendance of witnesses.*

50 Geo. 3, c. 41. Penalties under 20*l.*, how to be recovered (a).

Distress.

Overplus.

Imprisonment (b).

Sect. 26. No person committed to any gaol or house of correction for any offence committed against this act, shall be detained in such gaol or house of correction, for any longer space of time than 3 months.

Time of commitment.

Sect. 32. If any person or persons shall be summoned as a witness or witnesses, to give evidence before any justice or justices of the peace, touching any of the matters relative to this act, or the stat. 9 & 10 Will. 3, c. 27, and shall neglect or refuse to appear at the time and place to be for that purpose appointed, without a reasonable excuse for such neglect or refusal, to be allowed of by such justice or justices of the peace, or appearing, shall refuse to be examined upon oath, and give evidence before such justice or justices of the peace, before whom the prosecution shall be depending, that then every such person shall forfeit for every such offence the sum of 10*l.*, to be recovered, levied, and paid, in such manner and by such means as are herein directed as to the other penalties.

Witnesses refusing to attend or to give evidence.

By 22 & 23 Vict. c. 36, s. 4, Where any person shall be convicted of an offence under either of the aforesaid acts relating to hawkers and pedlars whereby a pecuniary penalty has become forfeited, it shall be lawful for the justice of the peace, or other person before whom the information or complaint is heard, and he is hereby authorised and empowered, if he shall think fit so to do, to mitigate the penalty to any sum not less than one fourth part thereof, over and above the necessary costs of the proceedings to be allowed by him.

22 & 23 Vict. c. 36. Power to justices, on conviction of a hawker, to mitigate the penalty to one fourth.

And by 24 & 25 Vict. c. 21, s. 4, all the powers, provisions, clauses, regulations, allowances, and exemptions, forfeitures, pains, and

24 & 25 Vict. c. 21. Provisions of former acts to apply to this act.

(a) See further the provisions of the 5 Geo. 4, c. 18, as to the enforcing payment of the penalty, *ante* "Distress under Justices' Warrant," Vol. II.

(b) See *ante*, Vol. I. tit. "Commit-

ment in Execution."

(c) By 3 Geo. 4, c. 23, s. 2, this recognisance may be entered into before any other justice. See "Conviction," Vol. I.

13. *Conviction—general issue.*—penalties contained in or imposed by any act or acts, or any schedule thereto, relating to any duties of the same kind or description as the several rates or duties granted by this act respectively, and in force at the time of the passing of this act, shall respectively be of full force and effect with respect to the said duties by this act granted respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned duties respectively, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the duties by this act granted respectively.

24 & 25 Vict. c. 21.

XIII. Conviction—General Issue.

50 Geo. 3, c. 41.
Form of conviction (a).

Sect. 28. A conviction in the form or to the effect following, *mutatis mutandis*, as the case shall happen to be, shall be good and effectual to all intents and purposes whatsoever, without stating the evidence, and without alleging more than the substance of the offence, in all cases wherein any such justice of the peace hath power to convict by virtue of the present act (b):—

“Be it remembered, That on the day of , in the year of our Lord , at , in the county of , A. B. came before me, C. D., one of his Majesty’s justices of the peace for the said county, residing near the place where the offence hereinafter mentioned was committed, and informed me, that E. F., of , in the said county of , [here set forth the fact for which the information is laid (c)], whereupon the said E. F., being duly summoned to answer the said charge, appeared before me (and having heard the charge contained in the said information, acknowledged and voluntarily confessed the facts therein stated to be true); but in his [or, “her”] defence alleged [here setting forth the substance of the defence.] [or, “voluntarily confessed the said charge to be true”] [or, “did not make any defence against the said charge, whereupon the same was fully proved on the oath of G. H., a credible witness”], [or, “said that he”] [or, “she”] “was not guilty of the said offence, whereupon the same was fully proved on the oath of G. H., a credible witness,” or as the case shall be], [or, “did not appear before me pursuant to the said summons, but the said charge was fully proved on the oath of G. H., a credible witness,” or as the case shall be]; and therefore it manifestly appearing to me that the said E. F. is guilty of the offence charged in the said information, I do hereby convict him [or, “her”] of the said offence, and do adjudge that he [or, “she”] hath forfeited the sum of , [or, “his” or “her” licence], and the sum of of lawful money of Great Britain, to be distributed as the law directs, according to the form of the statute in such case made and provided. Given under my hand and seal, the day of , in the year of our Lord .”

Certiorari.

Sect. 29. No conviction upon this act shall be removed or removable by writ of certiorari, or otherwise, into his Majesty’s court of King’s Bench or any other court, save upon an appeal as by this act is directed. See s. 27, *post*, p. 967.

Justices to trans-

Sect. 30. Every justice before whom any person hath already been

(a) As to the mode of framing convictions, when pointed out by statute, see *ante*, “Conviction,” Vol. I.

(b) The conviction is not to be set aside for mere inaccuracy. (*R. v.*

Aikin, 3 Burr. 1785; *R. v. Selway*, 2 Chit. Rep. 522.)

(c) See the information itself, and state the offence according to it.

convicted of any offence under or by virtue of any of the acts hereby repealed, and having received for his Majesty's use any part or share of any penalty levied, inflicted, or paid under or by virtue of such conviction, for which he has not already accounted, shall within 6 months after the passing of this act, transmit to the commissioners for licensing hawkers, pedlars, and petty chapmen (a), a schedule or schedules containing the names of the persons so convicted, the day on which they were convicted, their respective offences, and the respective sums now remaining in the hands of such justice for his Majesty's use, which were levied or paid under or by virtue of such convictions, arranged according to the several counties, ridings, or places within such convictions* hath been made, and every justice, before whom any such person shall be convicted of any offence under or by virtue of this act, shall take and receive his Majesty's share of the penalty levied or paid under or by virtue of such conviction, and that every such justice, his executors, or administrators, shall pay or cause to be paid all such sums of money as shall be remaining in his or their hands at the time of the passing of this act, at the next general quarter sessions of the peace after the passing of this act, and all such sums which he shall so take or receive upon any conviction under or by virtue of this act as aforesaid, at the next general sessions of the peace, after he shall have so taken or received the same, into the hands of the clerk of the peace, or other such like officer for the county, riding, or place, within which such conviction shall have been made, who is hereby directed to remit the same forthwith, without fee or reward, to the said commissioners (a) for licensing hawkers, pedlars, and petty chapmen, or to such person or persons as the greatest part of them shall appoint; and that every justice, his executors or administrators, shall, immediately on such payment made to any clerk of the peace, or other such officer, transmit a like schedule to the said commissioners, or to such person or persons as they, or the greater part of them, shall appoint.

14. *Appeal.*

50 Geo. 3, c. 41.
mit accounts of
convictions and
penalties.

Sic.

To pay over mo-
ney to clerk of
peace, who is to
remit same.

Sect. 34. If any person or persons shall at any time or times be sued, molested, or prosecuted for any thing by him or them done or executed in pursuance of this act, or of any clause, matter, or thing herein contained, such person or persons shall and may plead the general issue, and give the special matter in evidence, for his or their defence; and if, upon the trial, a verdict shall pass for the defendant or defendants; or the plaintiff or plaintiffs shall become nonsuited, or judgment shall be recovered against him or them upon demurrer; or if the plaintiff or plaintiffs shall discontinue his, her, or their action; or be nonprossed therein; then such defendant or defendants shall have treble costs awarded to him or them against such plaintiff or plaintiffs. But this enactment as to treble costs is materially affected by the 5 & 6 Vict. c. 97, s. 2, by which the defendant is entitled only to a full indemnity against costs.

General issue.

Treble costs.

XIV. *Appeal.*

By 50 Geo. 3, c. 41, s. 27, If any person or persons shall find him- self, herself, or themselves aggrieved by the judgment of any such justice, then he, she, or they, shall or may upon entering into a recognisance with two sufficient sureties, to be approved by such justice, to the amount of the value of such penalty and forfeiture, together with a sum which, in the judgment of such justice, shall be adequate to the amount of the costs which may be awarded,

Appeal.

(a) Now to the Commissioners of Excise.

15. *Forms.*

* *Sic.* The word "who" seems omitted.

conditioned to pay the amount of such penalties, forfeitures, and costs as shall be adjudged in case such judgment shall be affirmed, appeal to the justices of the peace at the next general sessions for the county, riding, or place,* are hereby empowered to summon and examine witnesses upon oath, and finally to hear and determine the same, or, at their discretion, to state the facts especially for the determination of his Majesty's Court of King's Bench thereon; and in case the judgment of such justice shall be affirmed, it shall be lawful for such justices, or the Court of King's Bench, to award the person or persons to pay such costs, occasioned by such appeal, as to them shall seem meet. (See, in general title, "*Appeal.*")

XV. *Forms.*

(1). Information against a licensed hawker for not having the words "licensed hawker," &c., on his package, &c. (*ante*, p. 957).

Be it remembered, that on &c., at &c., A. I., of _____, in the said county of _____, who, as well for our Lady the now Queen, as for himself in this behalf, doth prosecute, cometh before me, J. P., one of her Majesty's justices of the peace for the said county of _____, on the _____ day of _____, in the _____ year of the reign of our Lady the now Queen, and, as well for our said Lady the Queen as for himself, informeth me that C. D., being then and there a person to whom a licence was granted to travel and trade as a hawker, pedlar, and petty chapman, under and by virtue of the statute in that case made and provided, and also being then and there a trading person going from town to town [or, "to other men's houses"], and travelling on foot, [or, "with a horse," or as the case is], in England, [or, "Wales," or as the case is], carrying to sell, and exposing to sale, goods, wares, and merchandise, did on &c., at &c., trade with and under colour of such licence, by hawking for sale goods, wares, and merchandise, to wit, [here describe the goods], and did then and there, to wit, at _____ aforesaid, carry the said goods, wares, and merchandise in a pack, or as the case is [see the words of the act, *ante*, p. 957]; and that the said C. D. had not then and there caused to be written, painted, or printed in large legible Roman capitals, upon the most conspicuous part of the said pack, [or as the case may be, see the words of the act, *ante*, _____], in which he carried his said goods, wares, and merchandise, the words "Licensed Hawker," together with the number, name, or other mark or marks of distinction written or printed upon his said licence as aforesaid; contrary to the form of the statute in that case made and provided. Whereby, and by force of the same statute, the said C. D. had forfeited, for his said offence, the sum of ten pounds; and thereupon the said A. I., who informs as well for our said Lady the now Queen as for himself in this behalf, prayeth judgment of me the said justice in the premises.

Exhibited before me, the day and year first above named.

A. I.
J. P.

2). Information against a person not licensed as a hawker, for having the words "licensed hawker," &c., on his pack, &c. (*ante*, p. 957).

Commencement as in the preceding form. State the offence thus :—That C. D., late of &c., labourer, not being then and there a person to whom a licence was granted to travel and trade as a hawker, pedlar, and petty chapman, under or by virtue of a certain act of Parliament made and passed in the fiftieth year of the reign of his late Majesty King George the Third, intituled "An Act for placing the duties of hawkers and pedlars under the management of the commissioners of hackney coaches," and being then and there a trading person going and travelling on foot, [or, "with a horse," or as the case is], in England, [or, "Wales," or as the case is], carrying to sell, and exposing to sale, goods, wares, and merchandise, to wit, [here describe the goods generally], did on &c., at &c., write, paint, and print, and cause to be written, painted, and printed, and kept and continued written, painted, and printed upon his pack, [or, as the case is, see the words of the act, *ante*, p. 957], and in which said pack, [or, as the case is], the said C. D. then and there carried his said goods, wares, and merchandise as aforesaid, the words "Licensed Hawker," &c.; [as the fact is], contrary to the form of the statute in that case made and provided; whereby, &c. [Conclude as in form (No. 1), *supra*.]

Commencement as in form (No. 1), *supra*. State the offence thus :—*That C. D., late of &c., labourer, to wit, on &c., at &c., then and there being a hawker and trading person going from town to town, [or, “to other men’s houses”], and travelling on foot, [or, “with a horse,” or as the case is], in England, carrying to sell, and exposing to sale, goods as a hawker and trading person, did then and there, as a hawker and trading person going from town to town, [or, “to other men’s houses,” sell, carry to sell, and expose to sale, certain goods, wares, and merchandises, to wit, [here state the goods generally; there is no occasion to state the precise number or quality], without having obtained the licence [or as the case is] in that behalf directed and required by the statute in that case made and provided, in such manner as therein is directed, contrary to the form of the said statute; whereby, &c. [Conclude as in form (No. 1), supra.]*

15. Forms.

(3). Information against a person for trading as a hawker without a licence, (*ante*, p. 962.)

Commencement as in form (No. 1), *supra*. State the offence thus :—*That C. D., late of &c., labourer, on &c., being then a hawker, [“hawker, pedlar, petty chapman, or other trading person”], going from town to town, [or, “to other men’s houses”], and travelling on foot, [“either on foot or with horse, horses, or otherwise”], in England, carrying to sell, and exposing to sale, divers goods, wares, and merchandises, and a licence so to do being duly granted to him, according to the provisions of an act of Parliament made and passed in the fiftieth year of the reign of his late Majesty King George the Third, intituled “An Act for placing the duties of hawkers and pedlars under the management of the commissioners of hackney coaches,” did, at &c., [here state the improper act of trading done by defendant]; contrary to the licence so granted to him as aforesaid, and otherwise than was allowed by the same; and contrary to the form of the statute in such case made and provided. Whereby, &c. [Conclude as in form (No. 1), supra.]*

(4). Information on like act against a hawker acting contrary to his licence (p. 962).

Commencement as in form (No. 1), *supra*. State the offence thus :—*That C. D., late of &c., labourer, on &c., at &c., in the county aforesaid, being then and there a hawker, and duly licensed as such, according to the provisions of an act of Parliament made and passed in the fiftieth year of the reign of his late Majesty King George the Third, intituled “An Act for placing the duties of hawkers and pedlars under the management of the commissioners of hackney coaches,” and then and there trading under and by virtue of the licence in that behalf granted to him, did then and there refuse to produce and show his said licence for so trading as aforesaid, unto one A. C., [“constable of the parish aforesaid”], although the same was then and there demanded by the said A. C., as such [“constable”] as aforesaid; contrary to the form of the statute in such case made and provided. Whereby, &c. [Conclude as in form (No. 1), supra.]*

(5). Information on like act for not producing the licence.

_____ } To A. C., the constable of the parish of _____, in the said county of _____,
and to whom else this may concern :

(6). Summons on either of preceding informations.

WHEREAS A. I. of &c., did, on &c., come before me, J. P., one of Her Majesty’s justices of the peace in and for the said county, and make information that C. D. late of, &c. [state the offence, as in the information]; these are, therefore, to command you, in her said Majesty’s name, forthwith to summon the said C. D. to appear before me, at _____, in the said county, on the _____ day of _____, at the hour of _____ in the forenoon of the same day, to answer unto the said complaint, and further to do and receive what to law doth appertain; and be you then and there to certify what you shall have done in the execution hereof. Herein fail you not. Given under my hand and seal, the _____ day of _____, in the year of our Lord

J. P.

A general form of conviction is given by the 50 Geo. 3, c. 41. See *ante*, (7). Conviction. p. 966.

To A. C., the constable of _____, in the said county of _____.
Whereas C. D., late of &c., was, on &c., at &c., in the said county, before _____ (8). Warrant of distress.

Highways.

["me"], J. P., Esq., one of her Majesty's justices residing near to _____, in the said _____, duly convicted by me, of [state the offence, as in the information.] And thereby it was adjudged that the said C. D., for such his offence, should forfeit and pay the sum of ten pounds of lawful money of Great Britain, to be distributed according as the law directs. And whereas the said C. D. has had notice of the said conviction, but hath refused or neglected to pay, and hath not yet paid the said sum, pursuant to the said conviction, which hath been fully proved before me: These are, therefore, to command you to levy the sum of ["ten"] pounds by distress and sale of the goods and chattels of the said C. D., or of the goods and chattels with which the said C. D. was so found trading, as aforesaid. And I do hereby order and direct the goods and chattels so to be distrained, to be sold and disposed of within [not less than four nor more than eight] days, unless the said sum of ["ten"] pounds, for which such distress shall be made, together with the reasonable charges of taking such distress, shall be sooner paid. And you are also hereby commanded to certify to me what you shall do by virtue of this warrant. Given under my hand and seal at _____, the _____ day of _____, in the year of our Lord _____.

J. P.

9). Commitment
or non-payment.

To the constable of _____ in the said county, and to the keeper of the common gaol [or house of correction] at _____, in the said county.

These are to command you the said constable in her Majesty's name forthwith to convey and deliver into the custody of the said keeper of the said common gaol, the body of C. D., charged this day before me the said justice on the oath of A. B., of _____, and others, for that he the said C. D. [State the offence as in the information. Conclude thus:—and, upon full consideration had thereon, I, the said justice, have duly convicted him of the said offence, and have adjudged him to forfeit and pay, for his said offence, the sum of ten pounds of lawful money of Great Britain, which said sum of ten pounds has been demanded of the said C. D. by me the said justice, and he has not paid the said penalty. Him therefore safely keep in your custody until the said sum of ten pounds shall be levied by distress and sale of the goods and chattels of the said C. D., or of the goods and chattels with which he was so aforesaid found trading, together with the reasonable costs and charges of taking such distress, or until the same forfeiture shall be otherwise paid or satisfied; provided that the time of such imprisonment shall not exceed the space of three months; and for so doing this shall be your sufficient warrant. Given under my hand and seal, this day of _____, in the year of our Lord _____.

Hay.

As to the malicious burning of, see *ante*, "Burning."

Stats. 2 Will. 3, sess. 2, c. 8, and 8 & 9 Will. 3, c. 17, and 31 Geo. 2, c. 40, containing regulations concerning the selling of hay, straw, and cattle, within the bills of mortality, are, by stat. 36 Geo. 3, c. 88, repealed, so far as relates to hay and straw, but are not general enough to be here inserted at large.

The 4 Will. 4, c. 21, repeals part of the provisions contained in the 36 Geo. 3, c. 88, as to certain markets.

Highways.

SINCE the last edition of this work certain statutes have been passed, providing for the formation of highway boards in England and Wales. As these enactments are only in force within such counties or divisions as may have adopted them, and as they do not repeal the existing laws governing highways in general, it has been thought better to collect them under one sub-title, "*Highways into districts, formation of*," which see, p. 1096.

Bridges repaired by the parish or township, and which consequently come under the cognisance of the surveyor of the highways, are comprehended under this title. County bridges are treated of under title "*Bridges.*"

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I. CONCERNING HIGHWAYS IN GENERAL.

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4 & 5 Vict. c. 51, § 1, 1008; 5 & 6 Vict. c. 55, § 9, 1051; and c. 97, § 4, 1092; 8 & 9 Vict. c. 71, § 1, 1006; 11 & 12 Vict. c. 45, § 4, 1086; 12 Vict. c. 14, 1022 and 1025; 12 & 13 Vict. c. 35, §§ 1, 2, 3, 1020; 13 & 14 Vict. c. 99, 1022; 18 & 19 Vict. c. 121, § 22, 1047; 24 & 25 Vict. c. 97, § 25, p. 1055.

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26 & 27 Vict. c. 61, §§ 1, 2, 3, 1105, and c. 94, § 1, 1111.

27 & 28 Vict. c. 101, § 1, 1097; § 2, 1097; § 3, 1097; § 4, 1102; § 5, 1103; § 6, 1098; § 7, 1100; § 8, 1101; § 9, 1101; § 10, 1099; § 11, 1101; § 12, 1105; § 13, 1101; § 14, 1101; § 15, 1102; § 16, 1102; § 17, 1102; § 18, 1102; § 19, 1106; § 20, 1105; § 21, 1108; § 22, 1109; § 23, 1116; § 24, 1116; § 25, 1063; § 26, 1118; § 27, 1123; § 28, 1121; § 29, 1104; § 30, 1107; § 31, 1107; § 32, 1111; § 33, 1112; § 34, 1113; § 35, 1113; § 36, 1114; § 37, 1118; § 38, 1118; § 39, 1119; § 40, 1119; § 41, 1119; § 42, 1119; § 43, 1119; § 44, 1120; § 45, 1107; § 46, 1122; § 47, 1109; § 48, 1110; § 49, 1110; § 50, 1121; § 51, 1049; § 52, 1121; § 53, 1122.

I. What is a Highway.

Herein as to what is a highway:—

1. At Common Law. 2. By Statute.

1. At Common Law.]—A highway is a right of passage for the public in general without distinction. The term "*Highway*" extends to all public ways. (*R. v. Saintiff*, 6 Mod. 255.)

The public have a *prima facie* right of passage over the whole space of a highway between the fences, and therefore any obstruction of a permanent character erected thereon without lawful authority is a nuisance if it renders the way less convenient than it was before. (*Reg. v. Electric Telegraph Company*, 31 L. J. M. C. 166.)

There are three kinds of ways;—1. A footway (a);—2. A foot and horse way, which is also a pack or drift way;—3. A foot, horse, and cart way (b). (1 Inst. 56.)

A common street and a king's highway, though formerly distinguished, are now equally public ways. (*R. v. Hammond*, 1 Stra. 44.)

An open river, common to all men, is a highway. (*R. v. Hammond*, 10 Mod. 382; 1 Hawk. P. C. c. 76, s. 1; *Williams v. Wilcox*, 8 A. & E. 329.) So is a navigable river. (See *Miles v. Rose*, 5 Taunt. 705; *R. v. Montague*, 4 B. & C. 598.) And it seems that the public's right of passage extends to all parts of the channel. Every creek or river into which the tide flows is not, on that account, necessarily a public navigable channel, although sufficiently large for that purpose; but the flowing of the tide into such a creek or river, is strong *prima facie* evidence that it is a public navigation. (*R. v. Montague*, 4 B. & C. 598, per Bayley, J.) But it was observed by Mr. Justice Buller, in *Ball v. Herbert*, (3 T. R. 263), that a navigable river and a highway are perfectly distinct; and that if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands; though it is quite clear, as observed by the same learned judge, that if the usual track of a highway become impassable, by the overflowing of a stream or otherwise, the adjacent ground will be open to passengers, and so become, in effect, a highway, until the removal of the obstruction. (*Taylor v. Whitehead*, Dougl. 746, &c.; *Williams v. Wilcox*, *supra*, per Denman, C. J.) If the water in a navigable river alter its course, the way alters with it. (*Com. Dig. Chemin* (A 1); and see *Wellb.* 20; and *post*, p. 984.)

In *Callis on Sewers*, p. 73, it is said that the use of the banks of the sea and of great rivers is common to all the King's liege people, as to tie ships to the trees, to tow them, to lade and unlade merchandise, and to dry nets. (And see *Young v. —*, 1 Lord Raym. 725; *Pierce v. Fauconberge*, 1 Burr. 292.) But in *Ball v. Herbert* (3 T. R. 263), Buller, J., denies that this principle prevails in English law. (See *post*, tit. "*Rivers*.")

Though a towing-path is to be used only by horses towing vessels, yet it is a common highway for that purpose. (*Per Bayley, J.*, 2 B. & Ald. 648; *Young v. —*, 1 Lord Raym. 725.)

A bridge may be a common highway. (*Reg. v. Sainthill*, 2 Lord Raym. 1174; *Salk.* 359; *ante*, "*Bridges*.")

A flight of stairs leading to the Thames is not necessarily a highway. (*R. v. Limehouse*, 2 Show. 455.) And see as to a landing-place, *Drinkwater v. Porter*, 7 C. & P. 181.

1. What is a highway.

Division of subject.

1. At common law.

Definition of highway.

Kinds of.

A common street.

Open river.

Banks of same.

Towing-path.

Bridge.

Flight of stairs leading to the Thames.

(a) A public footway or bridleway is a highway for foot passengers, or for horse passengers, &c. (*R. v. Salop*, 13 East, 97. *Vide Allen v. Ormond*, 8 East, 4; *Logan v. Burton*, 5 B. & Cres. 513, S. C.)

(b) The term "*Cartway*," means a right for all carriages to pass. (*R. v. Hatfield*, Cas. temp. Hard. 315.)

1. *What is a highway.*

Railway.
Size of way.

Highway may be circuitous.

Where it must lead to.

A railway may be a highway, to be used in the particular mode in which railways are used. *R. v. Severn Railway Company*, 2 B. & Ald. 646. See *Rowe v. Shilson*, 4 B. & Ad. 726.)

The size of the way is not material. A right of way for all persons to pass and repass, with their carts and carriages, is not restrained, because all carriages cannot pass and repass. (*R. v. Lyon*, 5 D. & R. 497.)

There may be a highway, though it be circuitous. (*R. v. Lloyd*, 1 Camp. 260.)

It seemeth that any one of the above ways, which is common to all the Queen's people, whether it lead directly to a market town, or only from town to town, and do not terminate there, but is also a thoroughfare to other towns, may properly be called a highway. (1 *Hawk.* c. 76, s. 1.) For there were highways before there were market towns. And if it were essential to the constituting of a highway that it should expressly lead from market town to market town, then it would follow that the lord of a market, by forfeiting or surrendering his charter, might cause that to cease to be a highway which was a highway before; or the Queen, by granting a market in any place where there was no market before, might thereby consequently change the way to it from a private way into a highway. And therefore, the distinction which is taken in some books concerning this matter, seems to be very reasonable; that every way from town to town may be called a highway, because it is common to all the Queen's subjects; and consequently that a nuisance therein is a common nuisance, and punishable by indictment; but that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the Queen's subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein. (1 *Hawk.* c. 76, s. 1; *Austin's case*, 1 Vent. 189, per Hale, C. J.; *Wellb.* 7; and *Jarvis v. Dean*, 3 Bingh. 447.)

There may be a highway without a thoroughfare.

It seems the public may have a right to the use of a road, or, in other words, that there may be a highway without a thoroughfare. (See *Rugby Charity v. Merryweather*, 11 East, 375, n.; *R. v. Lloyd*, 1 Campb. 260.) But the correctness of this position is ably denied by Mr. *Wellbeloved*, in his work on *Highways*, 7 to 19, citing *Woodyer v. Hadden*; (5 Taunt. 138); and the opinions of *Abbott*, C. J., *Holroyd*, and *Best*, Js., in *Wood v. Veal* (5 B. & Ald. 454; and see *R. v. Marquis of Downshire*, 4 Ad. & E. 698); where, per *Patteson*, J., "It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage."

Since the 4 & 5 Will. 4, c. 50, justices have jurisdiction to determine whether a road is a highway or not (*Williams v. Adams*, 31 L. J. M. C. 109.)

There may be an occupation way and highway over the same road.

There may be both an occupation way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. (*Brownlow v. Tomlinson*, 1 Man. & G. 484—Per *Denman*, C. J., at *Nisi Prius*.)

A public highway may in point of law exist over a place which is not a thoroughfare (*Bateman v. Black*, 21 L. J. Q. B. 406.)

Width of highway.
Right of going on adjoining lands.

As to the width of a highway, see *post*, p. 1044.

As to the right of going on adjoining lands, &c., see *post*, p. 985.

2. By statute.

2. Under the Highway Act.]—Sect. 5 of the General Highway Act, 5 & 6 Will. 4, c. 50, enacts, that in the construction of that act, the word "highways" shall be construed to mean all roads, bridges, (not

being county bridges, see sect. 21 of that act, *post*, p. 1002), carriage-ways, cartways, horseways, bridgeways, footways, causeways, church-ways, and pavements.

2. *How a highway may be created.*

II. How a Highway may be created.

A highway may be created :—

How created.

1. *By Prescription*, p. 977.
2. *By Dedication*, p. 978.
3. *By Act of Parliament*, p. 983.
4. *By Necessity*, p. 984.

1. *By Prescription.*—The most common mode in which a highway is supported as being such is by prescription. If all persons without distinction have indiscriminately, for a considerable space of time, without interruption, used and enjoyed a way, such way will be presumed to be a highway. A much shorter period of possession will suffice to establish a right in the public, than a right in a private person to a way. The more open and notorious the user is, so much the more is there ground for presuming the way a highway. If the way was used for the repairs of other highways, or the like, that would especially, if known to the owner of the soil, afford strong evidence of the public right. (See *R. v. Wandsworth*, 1 B. & Ald. 63; 3 Stark. Evid. 63.)

1. By prescription.

The direct evidence that a way is public is, that it was made public under some statute or proceeding by writ *ad quod damnum*.

Direct evidence of way being public.

Presumptive evidence is derived from the *termini* and other circumstances of the road itself, and from the use and enjoyment of it by the public. (*R. v. Wandsworth*, 1 B. & Ald. 63. See 11 East, 376, n. (a)). Although the *termini* of a road afford no conclusive evidence as to its being a highway, (11 East, 375; *R. v. Lloyd*, 1 Campb. 262,) yet the circumstances of its leading from one market town to another, or from one public road to another, coupled with user by the public, and without decisive evidence of interruption and permission by a private owner, are conclusive as to the right of the public. (1 Vent. 189.) Repair of the way by a parish is strong evidence to show that it is a public highway; (*R. v. Wandsworth*, 1 B. & Ald. 63: and see *post*, p. 983;) and evidence of repairs done by parishioner, under an agreement with the parish that he should therefore be excused his statute duty, when that duty was enforceable, is virtually evidence of repairs by the parish. (*Ibid.*; and see *Marquis of Stafford v. Coyney*, 7 B. & C. 257.)

Presumptive evidence of same.

Termini.

Repairs by parish.

The performance of repairs upon a road under an act of parliament, is no evidence of its being a public one. (See *R. v. Mellor*, 1 B. & Ad. 32.)

Evidence of reputation is admissible to prove that the way is public (*Austin's case*, Ventr. 189; *B. N. P.* 295; and see *Barracough v. Johnson*, 8 Ad. & E. 99; *Fowler v. Port*, 7 C. & P. 792); or not public, (*Drinkwater v. Porter*, 7 Car. & P. 181). But such evidence arising *post litem motam* is inadmissible. (*R. v. Cottar*, 3 Campb. 444.)

Reputation.

On an issue, whether or not certain land in a district repairing its own roads was a common highway, it was held, that it was admissible evidence of reputation, (though slight,) that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation on the subject. (*Barracough v. Johnson*, *supra*.)

But where the question in a cause was, whether a particular road, admitted to exist, was public or private, and evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the

2. *How a highway may be created.*

road, on ground of which he was a tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy: it was held, that such declaration was not evidence, either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. (*R. v. Bliss*, 7 *Ad. & E.* 550.)

Verdict.

A verdict upon issue taken on a public right of way, and finding it to be such, is afterwards evidence, although such issue be taken in an action of trespass between private parties, and be offered in evidence to prove the fact between other parties in a civil action. (*Read v. Jackson*, 2 *East*, 357.)

Evidence that river public.

On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are sufficient evidence for the jury to presume it a public river. (*Miles v. Rose*, 5 *Taunt.* 704.)

2. By dedication.

2. *By Dedication.*—A way may become a public highway by a dedication of it to the public by the owner in fee. Such dedication is either express or implied.

Express dedication.

With regard to an *express* dedication, it is said by *Chambre, J.*, in *Woodyer v. Hadden* (5 *Taunt.* 125): "We know that, in dedicating churches, there is, after the work is completed, a formal act of dedication; and, by analogy, not only until the work is completed, but until the owner has shown some intention of dedicating the soil to the public, his right of excluding them continues." A formal declaration of such intention of dedicating a way to the public is sufficient. But in *R. v. Ward*, (Cro. Car. 266,) it is said, that the mere laying out of a way, though more commodious to the public, does not give the public a right of way there.

It is not necessary that the dedication should be by deed. In *Marquis of Stafford v. Coyney*, (7 *B. & C.* 257,) the court did not express any doubt as to the legality of the dedication, which was by parol dedication. Nor can anything but a parol dedication be presumed, where the public have used the way for not more than 6 or 7 years, and, *a fortiori*, where they have used it for 4 or 5 years only. It is also difficult to see to whom a grant can be made; the public cannot be the grantees, nor can a deed-poll be enrolled in any official custody for the protection of the public. (See *Allnutt v. Pott*, 1 *B. & Ad.* 309.)

This forms a distinction between public and private ways. A private way is an incorporeal hereditament, and is founded on a grant, or on a prescription, from which a grant may be presumed; (*Hewlins v. Shippam*, 5 *B. & C.* 221;) and such grant cannot be presumed, unless a user of the way has continued without interruption for 20 years. (See *Moore v. Rawson*, 3 *B. & C.* 332.)

Implied dedication.

With respect to what is an *implied* dedication, Lord *Ellenborough*, in *R. v. Lloyd*, (1 *Campb.* 260,) says, generally, that if the owner of the soil throws open a way, and marks by no visible distinction his intention to exclude the public, a dedication will be presumed. (So, in *Sir John Lade v. Shepherd*, 2 *Str.* 1004; and *Duncombe v. Smith*, *Wellb.* 61; and see *Surrey Canal Company v. Hall*, 1 *Scott's N. R.* 264.) And in *Reg. v. Petrie*, 21 *L. J. M. C.* 167, it was held that a public user of a road for some time is sufficient *prima facie* evidence of dedication of the road by the owner of the freehold to the public, and it is not necessary to show by whom the dedication was made.

When presumed.

Where the owners of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for 8 years, without any impediment, (such as a bar set across the street, and shut at pleasure, which would show the limited right of the public, it was held a sufficient time for presuming a dedication of the way to the public. (*Trustees of the Rugby Charity v. Merryweather*, 11 *East*, 375,

note. *Et vide Mansfield, C. J.'s, judgment, Woodyer v. Hadden, 5 Taunt. 142; and Davies v. Stephens, 7 Car. & P. 570.*)

And in another case, an inference of dedication was allowed, where the way had been used but for 4 or 5 years, and was in an unfinished state, being only partly paved. (*Jarvis v. Dean, 3 Bingh. 447.*)

Where a lease was granted of certain ground to be a passage for 56 years, evidence of the user of the road by the public 3 or 4 years after the expiration of the lease was held to be evidence of a gift to the public. (*R. v. Hudson, Str. 909.*)

By their act of incorporation, (41 Geo. 3, c. xxxi.,) the proprietors of the Surrey canal were required to erect and maintain bridges over the canal where it intersected any public highway, bridleway, or foot-path, and also for the use of the owners and occupiers of lands, &c. adjoining to the canal. In 1804, the company erected a swivel bridge (of sufficient dimensions to allow a carriage to traverse it) across the canal, at a spot where there had formerly been a public way, which at the most was only a bridle-way. This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants of an estate adjoining, called the Rolls estate. The neighbourhood having become extremely populous, and a district church having been built near the bridge, the public, from 1822 to 1832, freely and without interruption used it as a carriage-way. In 1832, the company for the first time imposed a toll upon all carriages traversing the bridge, with the exception of those belonging to the tenants of the Rolls estate; and in 1840 they removed the old swivel bridge, and erected a convenient stone bridge in the place of it. In an action of trespass against the defendant for passing over the bridge without paying toll, the judge told the jury, that, supposing the bridge in question to have been originally erected for the exclusive accommodation of the tenants of the Rolls estate, still, if, in consequence of the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication:—Held, that this was not a misdirection; and that the evidence warranted the jury in finding a dedication. (*Surrey Canal Company v. Hall, 1 M. & G. 392.*) In this case it was also held that there was nothing in the nature or constitution of the company to prevent them from dedicating to the public a right of way, as any other individual or corporate body might do.

But nothing done or suffered by a lessee, without the consent of the owner of the fee, can give a right of way to the public as against the owner (*Trustees of Rugby Charity v. Merryweather, 11 East, 375, n.; Wood v. Veal, 5 B. & Ald. 454;* (where the consent of the owner in fee was not inferred, though he had lived near the spot for 24 years); *Barraclough v. Johnson, 8 Ad. & E. 104.*) In *R. v. Barr, (4 Campb. 16.)* the acquiescence of the owner and landlord was inferred, where the way had been used a great many years, during successive tenancies, and the tenants had complained of such user to his steward. (And see *Davies v. Stephens, 7 C. & P. 570, and Doe v. Wilson, 11 East, 55.*)

The consent of the Crown will not be inferred from long use of a way by the public over Crown lands in the occupation of a tenant. (*Harper v. Charlesworth, 4 B. & C. 574.*)

But in determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. (*Barraclough v. Johnson, 8 Ad. & E. 99; 11 Q. B. 877; Surrey Canal Company v. Hall, 1 Scott's N. R. 264; Woodyer v. Hadden, 5 Taunt. 125.*)

Therefore, if it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. (*Barraclough v. Johnson, supra.*) Thus, where the owner of land agreed with an iron company, and with the

2. How a highway may be created.

When land under lease.

Crown lands.

How presumption of dedication rebutted.

2. *How a highway may be created.*

inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5s. a year, and find cinder to repair the way, and that the inhabitants of the hamlet should lead and lay down the cinder, and the way was thereupon left open to all persons passing with carriages for 19 years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for 5 years; it was held that the evidence showed no dedication, but a licence only, resumable on breach of the agreement. (*Barracough v. Johnson*, 8 A. & E. 99.)

So, where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public. (*R. v. St. Benedict*, 4 B. & Ald. 447; *R. v. Lyon*, 5 D. & R. 497. See *Surrey Canal Company v. Hall*, 1 Sc. N. R. 264.)

And where the plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for 21 years, during 19 of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the horseway paved at the expense of the inhabitants, it was held, (*dissentiente Chambre, J.*) that this street was not so dedicated to the public; that the defendant, pulling down his wall might enter it at the end adjoining to his land, and use it as a highway. (*Woodyer v. Hadden*, *supra*; and see 7 B. & C. 257.)

So, if there be an old way running along the side of my land, and, by my fences decaying, the public come on it, that is no dedication. (*Trustees of British Museum v. Finnis*, 5 C. & P. 460.)

The originally establishing a bar or obstruction is evidence to rebut the presumption of a dedication to the public, though it may have been down for some time (*Roberts v. Karr*, 1 Campb. 262); and this, though the bar be across only part of the way. (*Id.* And see *Lethbridge v. Winter*, *Id.* 263, n.)

But the fact of a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public, with a reservation of the right of keeping a gate across it, to prevent cattle straying. (*Davies v. Stephens*, 7 Car. & P. 570; *Rex v. Bliss*, 1 Jurist, 960.)

And in one case, Mr. Justice Park left it to the jury to decide whether a road, though originally meant to be a private one, had not subsequently been dedicated to the public, and the court held, that the case was for the jury. (*R. v. Wright*, 3 B. & Ad. 681.)

Partial dedication.

Although the dedication of a way to the public may be *partial* or limited as to the sort of way, (as to a horseway, &c., see *Marquis of Stafford v. Coyney*, 7 B. & C. 257; *per Holroyd, J.*; *Roberts v. Karr*, 1 Camp. 262, n.) yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor, for that would be the reservation of a right inconsistent with the dedication to the public. (*Fitzpatrick v. Robinson and others*, 1 Hudson & Brook, 585. See *Blundell v. Catterall*, 5 B. & Ald. 315; *Lade v. Shepherd*, 2 Str. 1004; *Barracough v. Johnson*, 8 Ad. & E. 99.)

Dedication of a road is an irrevocable licence granted to the public, who are to have the right of travelling along the road at their free will and pleasure. (*R. v. Lordsmere*, 15 Q. B. 689.) There may be a dedication for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public, and a partial dedication, invalid at law, will be merely void, and will not operate against the intention of the owner in favour of the whole public. (*Poole v. Huskisson*, 11 M. & W. 827.)

A dedication may be presumed against the crown by long acquiescence in the user of the road by the public, and the proper direction to the jury is whether the owner, whoever he may be, has consented to the public user in such a way as to satisfy them that there was a dedication to the public. (*R. v. East Mark*, 11 Q. B. 877.) In this case a tithing bound by custom to repair all public roads therein, was held liable to repair a road that had formed part of the waste of a manor, and had been set out as a private road by award of commissioners under a private inclosure act, and had been used by the public generally ever since it had been so set out. A portion of the waste had been allotted to the lord (as the act directed) in respect of his interest in the soil; and it was unsuccessfully contended that the crown had not dedicated this to the public. Although the grant of an occupation way cannot be presumed from a user of less than 20 years, yet it is not necessary, in order to destroy the right to such an easement, that a cesser of the use for 20 years should be proved. A cesser of the use for any period less than 20 years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy such an easement. If the owner of land has granted to an individual the easement of an occupation way over it, then the subsequent absolute dedication by him of a footway to the public in the same place cannot be presumed without also presuming or proving in fact a release of the easement by the individual; for without the release the owner can only be supposed to have given what he himself had a right of user not inconsistent with the easement. (*R. v. Chorley*, 12 Q. B. 515.)

2. *How a highway may be created.*

Dedication to the public.

If a road has been dedicated to the public and used, but the necessary steps have not been taken by notice or under 5 & 6 Will. 4, c. 50, s. 23, to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for its obstruction. (*Roberts v. Hunt*, 15 Q. B. 17.)

Highway not repairable by the parish.

By a local act passed in 1823, which was to be in force for 21 years, and the preamble of which stated that the making and maintaining a certain turnpike road would be of advantage to the public at large, certain trustees were appointed, who were enabled to make the turnpike road and required to erect sufficient fences where it passed through private lands. The act did not expressly declare that the road should be a highway, but it enabled all persons to use it on payment of toll. Part of the turnpike road was formed upon an existing road, which had been made under a local inclosure act, but which had never been declared to be completed, as provided by 41 Geo. 3, c. 149, s. 9. The turnpike road was completed and opened to the public in 1833, and had for 14 or 15 years since that time been used by the public, and a coach had at one time travelled over it. Part of the road passed through the parish of L., and was out of repair. No repairs had ever been done upon it by the parish. While the Turnpike Act continued in force an indictment was preferred and found against the parish of L. for non-repair. It was held, that the road was a common Queen's highway, which the parish was liable to repair; and that the indictment sufficiently described it as a common Queen's highway, without reference to its temporary nature under the Turnpike Act or the payment of toll. It was also held, that the negligence of the trustees in not making it pursuant to the statute did not render it the less a highway. (*R. v. Lordsmere*, 15 Q. B. 689.) Where, on an indictment for the non-repair of a highway, *ratione tenuræ*, the jury found specially that the original way adjoined the sea, which had encroached upon and carried away a portion of the land over which the highway went, and part of the lands in respect of the tenure of which the liability to repair the way attached, and that the defendant had from time to time appropriated other portions of his lands in lieu of such parts as had been washed away; and that, shortly before the period mentioned in

Highway for limited time.

2. *How a highway may be created.*

the indictment, the sea had made another encroachment, and swept away a large portion of the road altogether, and had left the rest so narrow on the brow of a cliff as to be impassable: Held, that this showed no liability on the part of the defendant to repair. (*R. v. Bamber*, 5 Q. B. 279.)

Adjoining waste.

A rector having claimed a piece of waste land adjoining the glebe land, the jury were held to be justified in finding against the presumption of law upon which his claim was rested, upon proof of possession by another person for more than 40 years, and during several successive incumbencies. (*Doe d. Harrison v. Hampson*, 4 C. B. 267.)

Evidence.

In an indictment against a township for non-repair of a road, an indictment against an adjoining township for non-repair of a portion of highway in continuation of the road in question, either submitted to or prosecuted to conviction, is admissible as evidence to prove the road in question to be a highway. (*Reg. v. Inhabitants of Brightside Bierlow*, 19 L. J. 50, M. C.)

Although an open river common to all men is a highway, yet this does not justify using it so as to injure any fisheries, as beds of oysters, if it be possible, with reasonable care, to make use of the river without doing such injury. (*Mayor of Colchester v. Brooke*, 7 Q. B. 339.) See also *Davies v. Mann* (10 M. & W. 546), where a man was held liable for driving over a donkey when it was in the high road with its legs so tied that it could not move out of the way.

A dedication of a highway must be taken to be made and accepted subject to any inconvenience or risk that may exist either upon or adjoining to the land so dedicated. (*Fisher v. Prowse and Cooper v. Walker*, 2 B. & S. 770; *Robbins v. Jones*, 33 L. J. C. P. 1; *Morant v. Chamberlin*, 6 H. & N. 541.) The dedication must be in perpetuity, and the rights of the public once acquired cannot be released by non user. (*Dawes v. Hawkins*, 8 C. B. N. S. 848.)

Where a bridge was used only when the river was dangerous, it was still held a public bridge. (*R. v. Devon*, R. & M. 141; *R. v. Northampton*, 2 M. & Scl. 262, per Lord Ellenborough. And see *Surrey Canal Company v. Hall*, 1 Scott's N. R. 264; *R. v. Marquis of Buckingham*, 4 Camp. 189.)

Where a landowner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals, it was held, that this was either a limited dedication of the road to the public, or no dedication at all; but, at all events, that a person carrying coals along the road, after a notice not to do so, was a trespasser. (*The Marquis of Stafford v. Coyney*, 7 B. & C. 257.) Mr. Justice Bayley and Mr. Justice Holroyd thought that there might be such a limited dedication; but *Littledale, J.*, doubted whether there could be. (See *Roberts v. Karr*, *supra*, p. 980. And see *Cowling v. Higginson*, 4 M. & W. 245.)

Dedication must be by owner in fee.

The dedication must be made by the owner in fee. Therefore, where the land over which the way was claimed had been leased for 99 years, though it had been paved and lighted by the public, and in a public statute called one of the streets of *Westminster*, such user of the way, though extensive, being by the consent of the lessee only, was held not binding on the owner of the inheritance; and that when the lease expired, he might prevent the public from using it. (*Wood v. Veal*, 5 B. & Ad. 454; *Barraclough v. Johnson*, 8 Ad. & E. 104. And see *Baxter v. Taylor*, 1 N. & M. 13.) See *ante*, p. 979, when the consent of the owner of the fee to the way being used will be presumed.

Trustees either for a public or private purpose, if owners in fee, may make the dedication, if the dedication be not inconsistent with the purposes of their trust. (*R. v. Inhabitants of Leake*, 5 B. & Ad. 469.) In *Rugby Charity v. Merryweather*, 11 East, 375 (n), the owners of the fee simple were trustees. (See *Rex v. Edmonton*, (2 N. & M. 24,) where the dedication was by churchwardens. And see *Surrey Canal*

Company v. Hall, (ante, p. 979,) where it was held that a canal company, incorporated by act of parliament, might dedicate to the public a right of way.)

2. *How a highway may be created.*

Consent of parish.

It seems now to be decided that it is not requisite that the *parish* through which a road passes should consent to its dedication, in order to make it a public one. (*R. v. Inhabitants of Leake*, 5 B. & Ad. 469. But see *R. v. Mellor*, 1 B. & Ad. 32.) But as regards the liability of the parish to repair it, the 5 & 6 Will. 4, c. 50, s. 23 (*post*, 992), provides, that no road or occupation-way made at the expense of individuals, nor driftway or horseway set out under an inclosure act, shall be liable to be repaired by the parish, unless the party proposing to dedicate such highway to the public shall give notice thereof to the surveyor, and shall make the same in a substantial manner, to be viewed and certified by two justices of the peace. And even then, although it may have been used by the parish for a year, yet the duty of repairing it is not cast upon the parish until it has been adopted by the local board, if the road be within a district under the Public Health Act, 1848 (*Reg. v. Duckinfield*, 32 L. J. M. C. 230), or sanctioned by justices in the manner provided by 5 & 6 W. 4, c. 50, s. 23. (*Reg. v. East Hagbourne*, 28 L. J. M. C. 71.)

The absence of repair by the parish is a strong circumstance in point of evidence to prove that the road is not a public one. The fact of repair has a contrary effect. (See *Davies v. Stephens*, 7 Car. & P. 570; *R. v. Edmonton*, 1 M. & Rob. 24, and ante, p. 977); but the conduct of the parish in acquiescing or refusing its acquiescence seems to be immaterial in every other point of view. (*R. v. Inhabitants of Leake*, 5 B. & Ad. 482.)

Where commissioners, who were empowered under an inclosure act to set out public and private roads, the former to be repaired by the township, and the latter by such persons as they should direct, exceeded their authority in awarding that private roads should be repaired by the township, it was held, upon the whole evidence, to be a proper question for a jury whether or not one of such private roads which had been repaired by the township, though originally intended to be private, had been dedicated to and adopted by the public. (*R. v. Wright*, 3 B. & Ad. 681.)

It is essential that the public should consent to it, by actual user or otherwise. (See *R. v. St. Benedict*, 4 B. & Ad. 447; *R. v. Paddington Vestry*, 9 B. & C. 456; *R. v. Leake*, 5 B. & Ad. 469.)

Consent of public.

The user of a road by the public during the period it is made public by virtue of an act of parliament, is not such an adoption of it by them as to make it a public way after such period has elapsed. (*R. v. Mellor*, 1 B. & Ad. 32.)

3. *By Act of Parliament.*—A highway may be created by an act of Parliament, containing a specific enactment as to it. (See *Sutcliffe v. Greenwood*, 8 Price, 535.) The provisions contained in the act must be strictly complied with, before the way can be established, or the liability to repair it enforced. Therefore, where notices were required to be given, but appeared not to have been given, the proceeding under the act was held invalid. (*R. v. Haslingfield*, 2 M. & Sel. 558.)

3. By act of Parliament.

So, where trustees are authorised by an act of parliament to make a road from one point to another, the making of the entire road is a condition precedent to any part of it becoming a highway repairable by the public. (*R. v. Cumberworth*, 3 B. & Adol. 108; *R. v. Hepworth*, id. 110. See *Blakemore v. The Glamorganshire Canal Navigation*, 1 Myln. & K. 162; *Wilkinson v. Bagshaw*, Peake's Add. Cas. 165; and *R. v. Eastern Counties' Railway Company*, 10 Ad. & E. 531.) Therefore, if trustees are authorised to make a turnpike road from A. to C., the entire road must be completed before the public can be compelled to repair any part of it, even a part which has been finished between 20

2. *How a highway may be created.*

and 30 years, and repaired from time to time by the public; and, although it joins at the point to which it has been made, another public road which is complete. (*Rex v. Edge Lane*, 4 A. & E. 723.)

And so, where trustees under a turnpike act were empowered to make a road from A. to B., and a branch from that road to C., it was held that the public were not compellable to repair the main road, though complete in its whole extent, till the branch was finished. (*Rex v. Cumberworth*, 4 A. & E. 731.)

But where a local turnpike act recited, "that the making and maintaining a new turnpike road from Leeds to join the Wakefield and Halifax turnpike road at a certain point, and several branch roads therein also described) from and out of the said main turnpike road, would be an advantage to the inhabitants of Leeds and Halifax, and to the public in general; and it authorised the making of the several roads, and enacted, that the said new roads should not be respectively opened to the public, or become public roads, until 2 justices should have certified that the said roads *respectively*, and the works thereon *respectively*, were completely made and fit to be travelled upon throughout the whole length of such roads *respectively*." *Littledale and Taunton, Js.*, expressed themselves of opinion, that the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed and fit to be travelled on; but that the main road when so completed, and certified so to be by 2 justices, became a public road, although the branch roads were still unfinished. (*R. v. The Justices of the W. R. Yorkshire*, 5 B. & Ad. 1003.)

Where a railway was made under the authority of an act of parliament incorporating the proprietors, and providing that the public should have the beneficial enjoyment of the railway, a mandamus was granted to compel the company to reinstate part of the railway which had been rendered impassable by taking up part of the iron tram plates thereon. (*R. v. Severn and Wye Railway*, 2 B. & Ald. 646.)

In one case it was held, that if a way has been recognised as public in an act of parliament for making streets, squares, &c., it is not necessary that it should be adopted by the parish to make it a public way. (*R. v. Lyon*, 5 D. & R. 497) (a). All persons are presumed to have consented to an act of parliament.

But if an act of parliament make a road public during a limited period, it is not a public road after such period has expired, unless it then be dedicated to the public, &c. (*R. v. Mellor*, 1 B. & Adol. 36; *R. v. Winter*, 7 B. & C. 785.) And see, *ante*, p. 983, as to the effect of user of the road by the public during such period.

4. *By necessity.*

4. *By Necessity.*—If a highway be impassable from being out of repair, or otherwise, the public have a right to pass in another line, and, for this purpose, to go on the adjoining ground; and it makes no difference whether it be sown with grain or not. (1 *Roll. Ab.* 390, a. pl. 1, and b. pl. 1; and see *Ellison v. Isles*, 11 Ad. & E. 665.)

And it is clear law, established by a number of cases, particularly that of *Absor v. French* (B. R. M. 30 Car. 2; 2 *Show.* 21), and *Henn's case* (*Sir W. Jones*, 296), that where a common highway is out of repair by the overflowing of a river or any other cause, passengers have a right to go upon the adjacent ground.

So, if the water of a navigable river impairs or decreases a towing-path beside it, the public shall have a towing-path on the adjoining land. (*Young v. —*, 1 *Ld. Raym.* 725.)

(a) See *ante*, p. 983, as to it not being necessary that the parish should

consent to the way being a public one, in order to make it so.

It hath been holden, that if there be a highway in an open field, and the people have used time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not the beaten track only; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundeours, the king's subjects may justify going upon the corn. (1 *Hawk. c. 76, s. 2. See Sir E. Duncombe's case, Cro. Car.* 366.)

And it has been held, that where a man incloseth and doth not make a good way (as in such case he is bound to do, by reason of the inclosure), it is lawful for passengers to make gaps in his hedges to avoid the ill way, so that they do not go further into his inclosed grounds than is needful for avoiding the bad way. (*Henn's case, Sir W. Jones, 296; Absor v. French, 2 Show. 21; Asser v. Finch, 2 Lev. 234; 1 Lord Raym. 725, S. C.*)

This privilege of going over the adjoining lands is confined to highways; and the grantee of a private way has no such privilege, generally speaking. (*Taylor v. Whitehead, Dougl. 745 (a); Bullard v. Harrison, 4 M. & Sel. 387; 1 Saund. 323, n. 6.*) If I have a private way without a gate, and a gate is hung up, an action lies upon the case, for I have not my way as I had before. (*Litt. R. 267.*) So, if one grant me a way, and afterwards dig trenches in it to my hindrance, I may fill them up again. (*God. 53.*) But if a way which a man has, become not passable, or become very bad, by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. But in such case he may bring his action against the owner of the land for spoiling the way, or perhaps he may go out of the way, upon the land of the wrong-doer, as near to the bad way as he can. (*God. 52; and see Osborn v. Wise, 7 Car. & P. 761.*)

If a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands. (*Ball v. Herbert, 3 T. R. 263; Williams v. Wilcox, 8 Ad. & E. 330.*)

(a) This was an action of trespass, for breaking and entering the plaintiff's close. The defendant pleaded (*inter alia*) a right of way by prescription, through a lane of the plaintiff's, contiguous to the *locus in quo*, to *Olley-bridge* on the river *Wharfe*, in *Yorkshire*, and that the tenants and occupiers of those lands were, from time whereof, &c., by reason of their tenure, bound to repair the lane, and the banks thereof next to the river: that at several times the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life and goods; and that he necessarily went over the lands adjoining, as near to the said way as he possibly could, as it was lawful for him to do, &c. This cause was tried before Lord *Loughborough* at *York*, in 1780, and afterwards argued in the court of K. B.—*Et per* *Ld.*

Mansfield, C. J.: "The question is upon the grant of this way. Now, it is not laid to be a grant of a way generally over the land; but of a precise specific way. The grantor says, you may go in this particular line; but I do not give you a right to go either on the right or left. I entirely agree with my brother *Walker*, that, by common law, 'he who hath the use of any thing ought to repair it.' The grantor may bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river; and for aught that appears, that may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual track be impassable, it is for the general good that people should be entitled to pass in another line."

2. How a highway may be created.

3. *Of the ownership of the soil, &c. in highways.* As to the power of the surveyor of highways to make a road through grounds adjoining to any ruinous or narrow part of a highway, whilst the road is repairing or widening, see *post*, 1028.

III. Of the Ownership of the Soil, &c. in Highways.

To whom the freehold of a highway belongeth.

The freehold of the highways is in him that hath the freehold of the soil; but the free passage is for all the queen's liege people. (2 *Inst.* 705. And see *Sir John Lade v. Shepherd*, 2 *Str.* 1044.)

The queen has nothing but the passage for herself and her people; for the freehold and all profits belong to the owner of the soil; and all the profits, trees, and mines upon and under it. (*Goodtitle v. Alker*, 1 *Burr.* 143; 1 *Roll. Ab.* 392.) In 5 & 6 Will. 4, c. 50, s. 82, there is a saving of mines to the owner of lands taken for widening narrow roads.

Nor does the soil vest in turnpike trustees, unless there is a special clause in the statute for that purpose. (*Davidson v. Gill*, 1 *East*, 69. See also *R. v. Mersey Navigation*, 9 B. & C. 95; *Rex v. Thomas*, *Id.* 114.)

The owner may maintain an ejectment for the soil (*Goodtitle v. Alker*, 1 *Burr.* 133; *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; and see *Scales v. Pickering*, 4 *Bing.* 448); or trespass for any other wrongful act done to it or the profits. (*Dovaston v. Payne*, 2 *Hen. Bla.* 527; *Stevens v. Whistler*, 11 *East*, 51); and he may remove anything not justified by the easement, though it be not a nuisance. (*Reg. v. Matthias*, 2 F. & F. per *Byles*, J.)

Presumption of ownership of soil of highway, and of waste lands adjoining thereto.

Waste lands adjoining to public highways are presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor; but that presumption prevails only so long as proof to the contrary is wanting. (*Steel v. Prickett*, 2 *Stark.* 463.) Such presumption arises whether such owner be a freeholder or copyholder. (*Doe v. Pearsey*, 7 B. & C. 304.)

Where strips of land lie between a highway and an adjoining inclosure, the *primâ facie* presumption is, that such strips of land, as well as the soil of the highway *ad medium filum vice*, are the property of the owner of the inclosure (*Cooke v. Green*, 11 *Price*, 736: and see *Scoones v. Morrell*, 1 *Beav.* 251; *R. v. Edmonton*, 1 M. & Rob. 24; *Berridge v. Ward*, 30 L. J. C. P. 218; *Dendy v. Simpson*, 7 *Jur. N. S.* 1058; and nothing in 3 Geo. 4, c. 126, alters this presumption, *Lord Salisbury v. G. N. R. Coy.*, 5 C. B. N. S. 174); but the presumption is to be confined to that extent; for, if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. (*Grose v. West*, 7 *Taunt.* 39.)

It seems that where the herbage of a road becomes vested, by the General Inclosure Act (41 Geo. 3, c. 109, s. 11), in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors. (*R. v. Inhabitants of Hatfield*, 4 A. & E. 156.) In this case Lord Denman said, "I do not think that any legal presumption can arise as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority." (And see *R. v. Edmonton*, 1 M. & Rob. 24.)

In ejectment, the question was whether a slip of land between some ancient inclosures and a highway belonged to the owner of the adjoining land, or to the lord of the manor; held, that acts of ownership by the lord (grants of licences to inclose) over slips skirting the same road, the continuity of which was only broken by a bridge and some ancient tenements, were admissible in evidence; but that

grants, made by the lord, of waste lands in other parts of the manor, which were not in continuity with the spot in dispute, were not admissible in evidence. (*Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102.) But, perhaps, if it had appeared that the waste lands then granted by these grants adjoined the same road as the spot in dispute adjoined, and such road terminated in a common, these latter grants would have been held admissible. (*Id.*; and see *Doe d. Barrett v. Kemp*, 7 Bing. 332.)

As to trespassing upon a highway, or upon waste lands adjoining thereto, in pursuit of game, see "*Game*," p. 775.

If a person incloses part of the waste, and dies within twenty years, the part so inclosed (except as against the rightful owner) descends to his heir, and does not go to his executor. (*Doe d. Pritchard v. Jauncey*, 8 Car. & P. 99.)

If a person takes a farm, and then takes a bit of the waste and annexes it to the farm, he does not take this in for himself, but for his landlord. (*Doe d. Harrison v. Murrell*, 8 Car. & P. 134.)

Premises had been inclosed from the waste, with the knowledge of the lord, 10 years before the action was brought. Three days before the action was brought, the lord brought down the fences:—Held, to be a sufficient revocation of any licence which could be presumed from previous acquiescence. (*Doe d. Beck v. Parker*, 6 A. & E. 495.)

Up to the point reached by the flow of the tide, the soil of navigable rivers was presumably in the crown; and above that point, whether the soil at common law was in the crown or the owners of the adjacent grounds, is a point, perhaps, not free from doubt. (See *Williams v. Wilcox*, 8 Ad. & E. 333; *Com. Dig. Navigation A*. See *De Jure Maris*, p. 9; and *tit. "Rivers."*)

The presumption that the soil of the road *usque ad medium filum vice*, belongs to the adjoining owners applies equally to a private as to a public road. (*Holmes v. Bellingham*, 7 C. B. N. S. 329.)

4. *Repeal of former statutes.*

Trespassing upon in pursuit of game.

Encroachment on waste lands.

Soil of navigable rivers.

IV. Repeal of former Statutes by the General Highway Act, 5 & 6 Will. 4, c. 50.—Penalties and Contracts under repealed Act.

By the 5 & 6 Will. 4, c. 50, intituled "An Act to consolidate and amend the laws relating to highways in that part of Great Britain called England," after reciting that it is expedient to amend the laws relating to highways in that part of Great Britain called England, and to consolidate the same in one act; and make other provisions respecting highways: it is enacted, that so much of the 6 Geo. 1, c. 6, as relates to the carriage of bricks, except so far as the same relates to the city of London; and also 18 Geo. 2, except so far as the same relates to the city of London; and also so much of the 24 Geo. 2, as relates to the preventing mischief occasioned by the drivers riding upon carts, drays, carriages, and waggons in the city of London or within 10 miles thereof, except so far as the same relates to the city of London; and also the 30 Geo. 2, except so far as the same relates to the city of London; and also 13 Geo. 3, c. 78; 34 Geo. 3, c. 64 (a); 34 Geo. 3, c. 74; and also so much of the 42 Geo. 3, c. 90, as relates to the exemption of any serjeant, corporal, drummer, or private of the militia from performing highway duty, commonly called statute duty; and also 44 Geo. 3, c. 52; 54 Geo. 3, c. 109; and 55 Geo. 3, c. 68, shall be, and the same are hereby repealed (b).

5 & 6 Will. 4, c. 50.

Repeal of 6 Geo. 1, c. 6, in part, except as to London.

18 Geo. 2, c. 33, except as to London.

24 Geo. 2, c. 43, in part, except as to London.

30 Geo. 2, c. 22, except as to London;

Part of 42 Geo. 3, c. 90.

(a) This statute is not repealed as to bridges. (*Reg. v. Justices of the Peace of Merionethshire*, 6 Q. B. 343, and

Reg. v. J. P. of Brecon, Q. B. 813.)

(b) Mr. Woolrych questions whether the stat. 2 Edw. 3, c. 6, is en-

6. *Of the repair of highways.* See sects. 101, 103, &c., as to the recovery of penalties and forfeitures, post, "*Mode of Recovering Penalties.*"

V. Interpretation Clause in 5 & 6 Will. 4, c. 50.

Interpretation clause.	By 5 & 6 Will. 4, c. 50, s. 5, in construction of this act the word
"Surveyor."	"surveyor" shall be understood to mean surveyor of the highways, or waywarden; the word " <i>parish</i> " (a) shall be construed to include
"Parish."	parish, township, tithing, rape, vill, wapentake, division, city, borough, liberty, market town, franchise, hamlet, precinct, chapelry, or any other place or district maintaining its own highways; and
Inhabitants of any parish in vestry assembled.	wherever anything in this act is prescribed to be done by the <i>inhabitants of any parish in vestry assembled</i> , the same shall be construed to extend to any meeting of inhabitants contributing to the highway rates in places where there shall be no vestry meeting, provided the same notice shall have been given of the said meeting as would be required by law for the assembling of a meeting in vestry; and that the word " <i>highways</i> " shall be understood to mean all roads, bridges, (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements; and that the word " <i>justices</i> " shall be understood to mean justices of the peace for the county, riding, division, shire, city, town, borough, liberty, or place in which the highway may be situate or in which the offence may be committed; and that the word " <i>church</i> ," shall be understood to include chapel; and that the word " <i>division</i> " shall be understood to include limit; and that the word " <i>owner</i> " shall be understood to include occupier; and " <i>inhabitant</i> " to include any person rated to the highway rate; and the words " <i>petty session</i> " or " <i>petty sessions</i> ," to mean the petty session or petty sessions held for the division or place; and wherever in this act, in describing or referring to any person or party, animal, matter, or thing, the word importing the <i>singular number</i> or the <i>masculine gender</i> only is used, the same shall be understood to include and shall be applied to several persons or parties as well of one person or party, and females as well as males, and several animals, matters, or things, as well as one animal, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction; and all the powers hereby given to, and notices, matters, and things required for, and duties, liabilities, and forfeitures imposed on, surveyors, shall be applicable to all persons, bodies politic or corporate, liable to the repair of any highway.
"Highways."	
"Justices."	
"Church."	
"Division."	
"Owner."	
"Inhabitant."	
"Petty Session."	
Singular number. Masculine gender.	
Powers, &c., given to surveyors applicable to bodies politic, &c.	

VI. Of the Repair of Highways.

Division of subject.

Herein of—

1. *The Liability of the Parish to repair—Highway in Two Parishes—Nature of repairs, &c., p. 989.*
2. *The like of a Township or Part of a Parish, p. 996.*
3. *The like of an Extra-Parochial Place, p. 998.*
4. *The like of Individuals in respect of Inclosure, p. 998.*
5. *The like of Individuals, &c., by Prescription, &c., p. 999.*
6. *The Repair of Roads passing over Bridges, p. 1002.*

tirely abrogated by this act, as far as the former relates to the power of justices over certain certificates regarding the repairs of ways. (*Wool-*

rych, p. 3.)

(a) 25 & 26 Vict. c. 61, s. 3, enacts, that "*parish*" is to include any place maintaining its own highways.

7. *The Board for the Repair of Highways*, p. 1002.
8. *Power for Board to hire, &c., Premises for keeping of Materials, &c., and to direct how Ways to be paved*, p. 1003.
9. *Direction-posts, Flood-posts, to be erected, and causeways secured from Carriages, &c.*, p. 1004.
10. *Grounds adjoining Roads, except Gardens, may be used as a temporary Road*, p. 1004.
11. *Surveyor to remove Obstructions from Snow or falling down of Banks, &c.*, p. 1005.

6. *Of the repair of highways.*

1. LIABILITY OF THE PARISH TO REPAIR—HIGHWAYS IN TWO PARISHES—NATURE OF REPAIRS, &c.

It seems to be agreed, that of common right (that is, by the common law), the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein they are (a); but particular persons may also be burdened with the general charge of repairing a highway, in two cases, namely, in respect of an inclosure, or by prescription. (1 *Roll. Ab.* 390; *Anon.*, 1 *Ventr.* 90; *Austin's case*, *Id.* 183; *R. v. Ragley, Parish of*, 12 *Mod.* 409.)

(1. Liability of parish to repair.

And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted, by the provisions of a road act, from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. (*R. v. Sheffield*, 2 *T. R.* 106. And see *R. v. Oxfordshire*, 4 *B. & Ald.* 194.)

And upon the same principle it was holden, that if particular persons were made chargeable to the repairs of such highways by a statute lately made, and became insolvent, the justices of peace might put that charge upon the rest of the inhabitants. (*Anon.*, 1 *Ld. Raym.* 725.)

The alteration of a highway under an inclosure act will not operate as a stopping up or diversion of the road, or in any way alter the liability of the parish to repair it, unless the order and certificate of justices are duly obtained. (*R. v. Inhabitants of Cricklade*, 19 *L. J.* 169, *M. C.*)

Liability of parish.

Where, by a local act, the proprietors of a navigation were directed to repair an ancient highway situate in the township of B., and were subjected to indictment in case of default, by the same act nothing

Liability of township to repair.

(a) By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired. The commissioners, by their award, directed that there should be certain roads. One of these, called the Sand-toft road, passed between new allot-

ments. The road was ancient. The part of the common over which it ran, before the award, was in the township of H., and the road was still in that township, unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable:—Held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, and therefore that the road in question continued to be in H. (*R. v. Inhabitants of Hatfield*, 4 *A. & E.* 156.)

6. *Of the repair of highways.*

Way under the care of commissioners.

therein contained "was to excuse the inhabitants of the several townships, &c., in which the said way lieth, from contributing to the repairs thereof with their carts, &c., or otherwise, as they are now obliged to do by law;" it was held, that the township of B. was not exempted from the common law liability to repair the highway. (*R. v. Brightside Bierlow*, 19 L. J. 50, M. C.)

So, where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose; and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street: it was held, that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair: that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over, against the commissioners. (*R. v. St. George, Hanover Square*, 3 Campb. 222; and *R. v. Oxfordshire*, 4 B. & C. 194; *et per Cur.*, in *Bussey v. Storey*, 4 B. & Adol. 109):—"It is a mistake to suppose, as was urged in the argument on behalf of the plaintiff in error, that the object of this and other turnpike acts is to relieve parishes and townships from the burden of repairing the highways. Their object is to improve the roads for the general benefit of the public by imposing a pecuniary tax, in addition to the means already provided by law for that purpose. The obligation to maintain all public roads (with the exception of those which are to be repaired *ratione tenuræ* or *clausuræ*) is a public obligation, and in the nature of a public tax. The repairing by parishes or townships of some parts, and by counties of other parts, are merely modes which the law has provided for discharging that obligation. It is their share of the public burden which those districts have to pay, and which is imposed for the general benefit of the community; and tolls are an additional tax for the same purpose.

And where a highway has been converted into a turnpike road, and placed under the management of trustees, with power to collect tolls to be applied to the repairs; if the way be out of repair, the parish (or township, as the case may be) are the only persons who are liable to be indicted, and must seek their remedy over against the trustees, which they have after conviction by motion for relief against the trustees under the turnpike act, 3 Geo. 4, c. 126, s. 110 (*R. v. Netherthong*, 2 B. & Ald. 179; *George v. Chambers*, 11 M. & W. 149, *per Alderson*, B.; *et per Cockburn*, C. J., in *Sunk Island Road v. Patrington*, 31 L. J. M. C. 18, *post*, tit. "Turnpike.")

Ways set out under General Inclosure Act.

By sect. 9 of the General Inclosure Act (41 Geo. 3, c. 109), a parish, &c., is not liable to repair certain ways set out under that act, until the same have been, by justices in special sessions, declared to be fully and sufficiently formed, completed and repaired. Under this section, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. (*Rex v. Hatfield (Inhabs.)*, 4 A. & E. 156. See *post*, tit. "Inclosure.")

Bridges.

As we have seen, a bridge may be a highway (2 *Ld. Raym.* 1174), but county bridges (a) are not included under that appellation in the present Highway Act, unless specially mentioned. (See the interpretation clause, sect. 5, *ante*, p. 988.) By the common law, as the inhabitants of parishes are *primâ facie* liable to the repair of highways, so in the absence of other usage, prescription, or statute to the contrary, the inhabitants of counties are liable to the repair of county bridges.

(a) See *R. v. Whitney*, 3 A. & E. 69, *ante*, tit. "Bridges."

(*Hawk. P. C. B.* 1, c. 7, s. 1; *Bac. Abr. Bridges*; *R. v. W. R. York-shire*, 5 Burr. 2594.) The county and not the parish is liable to repair the road within 300 feet of the end of a county bridge built before the 20th of March, 1836 (5 & 6 Will. 4, c. 50, s. 21, *post*, p. 1002, and tit. "Bridges").

Where a railway is carried over a highway by a bridge, no liability to repair the approaches to the bridge is cast upon the railway by the railway clauses act. (*London & N. W. Ry. Coy. v. Skerton*, 33 L. J. M. C. 158.)

An order of justices, made under 8 Vict. c. 20, s. 58, directing a railway company to repair damage done by them to a road, need not specify the particulars of the damage done, or of the repairs ordered, if it states the length of road injured, and directs the damage so done to be made good. Such an order, as well as a conviction adjudging a penalty for its disobedience, may include several roads situate in the same parish. The conviction purported to be made by virtue of the Railways Clauses Consolidation Act, and it was held sufficient. (*London and North-Western Railway v. Wetherell*, 20 L. J. 337, Q. B.)

On no one is any duty imposed by the common law to do that to a navigable river, which would be analogous to the ordinary repair of a common highway, viz., to remove obstructions, to clear away sand-banks, and preserve any accustomed channel. (See *Williams v. Wilcox*, 8 Ad. & E. 329.) However, it is laid down in *Hawkins*, that if a river be stopped to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it. (1 H. P. C., c. 75, s. 13; see *Bac. Ab.* tit. "Nuisance," (C.), 37 Ass. 10, 2 Roll. Abr. 137.)

The liability of a parish to repair does not extend to private ways. Even where the commissioners under an inclosure act had authority to order any person to repair the private ways, and they ordered the parish to do it, it was held that the parish was not liable, and that the words of the act must be confined to any persons interested in such ways. (*R. v. Cottingham*, 6 T. R. 20 (a). See *R. v. Richards*, 8 T. R.

(a) *R. v. Inh. of Enfield*, Sitt. after H., 1819, cor. Abbott, C. J., MS. 2 Burn's J., 24th ed. 821. Indictment against the defendants for not repairing a road, called *Welch's Lane*, and the road over the marshes, leading from the turnpike road at *Enfield Wash* to the government foundry for small arms. Plea, not guilty. In support of the indictment, it was contended—That this lane was an ancient public highway, and had been repaired by the parish, time out of mind; that the commissioners under the *Enfield* inclosure act could not abolish it as a public road, without the order of two justices, which they never obtained; that the commissioners had set it out, and improperly called it a private road, but had directed the parish to repair it: that this was not like the *Cottingham* case, where the parish was not liable to the repair of the road previous to the inclosure, nor had any allotment under the act; for that here the parish of *Enfield* had always repaired

this lane, which led from the turnpike road to the river *Lea*, and had, also, an allotment under the act, as well as a share of the timber growing on the chase; and that the commissioners were, therefore, justified, when they set out this road, in directing the parish to repair it. Upon the cross-examination of witnesses for the prosecution, it appeared, that at the lower end of *Welch's Lane*, a gate across a part of the road leading over an ancient inclosure into the marshes, had been occasionally locked; and that the farmers holding lands in the marshes formerly paid threepence or fourpence an acre for carrying their hay through this inclosure, when Abbott, C. J., stopping the counsel for the Crown, said, that unless the prosecutors were prepared to contradict their own witnesses, the case must end:—that a public highway must lead from one town or vill to another, and be free for the passage of all H.M.'s subjects; whereas, it was proved in evidence, that *Welch's*

6. Of the repair of highways.

Repair by railway company.

Rivers.

Private ways.

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.
New highways,
when they are to
be kept in repair
by parishes (a).

Proviso as to de-
termining utility
of highway.

634; *R. v. Edmonton*, 1 M. & Rob. 24.) If the parish relies on the award of such commissioners of inclosure, to show that the road is not within their limits, evidence must be adduced that the notices required by the act were given, or that the subsequent usage had been such as to raise an inference that due notice had been given. If the parish since the inclosure has repaired the road, the inference is unfavourable to the parish. (*R. v. Haslingfield*, 2 M. & Sel. 558. And see *R. v. Washbrook*, 4 B. & C. 732.)

By the 5 & 6 Will. 4, c. 50, s. 23, no road or occupation-way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate (b), nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure act (c), shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent (d), and shall have made or shall make the same in a substantial manner, and of the width required by this act (*post*, s. 80), and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this act, at the expense of the party requiring such view (e), which certificate shall be inrolled (f) at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public (g), and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: Provided, nevertheless, that on receipt of such notice as aforesaid, the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the

Lane led only to a farm-house, and that the occupiers of the marshes had paid toll for the liberty of bringing their hay along that part of the road over the ancient inclosure; and as to the repairs heretofore done to *Welch's Lane*, it appeared that the tenant of the farm got into the office of surveyor, and put his hand into the parish purse to repair his own road; this, therefore, never was a public highway. The General Inclosure Act, which passed on the same day as the *Enfield* Inclosure Act, directs that all roads over lands to be inclosed, not set out by the commissioners, shall be deemed part of the lands to be inclosed; the commissioners did set out this road, but expressly set it

out as a private road; the parish, therefore, was not bound to repair it. Verdict, not guilty.

(a) See the observations of Mr. *Woolrych* on this enactment, in his *Treatise on the Highway Act*, p. 25, &c.

(b) As to the dedication of roads to the public, see *ante*, p. 978.

(c) See tit. "*Inclosures*."

(d) See form of notice, *post*, No. 4.

(e) See form of certificate, *post*, No. 5.

(f) The want of the enrolment would not, it seems, vitiate the certificate, being a ministerial act. (*De Pontkieu v. Pennyfeather*, 5 Taunt. 634.)

(g) See *ante*, p. 981.

next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices (a).

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.

Under this section magistrates are justified in refusing their certificate if the whole of the road be not of the required width. (*Reg. v. Justices of the Peace of Surrey*, 3 L. T. N. S. 808.)

This enactment does not apply to roads completely public by dedication before the passing of the act; but it applies to roads then made and in progress of dedication. (*R. v. Westmark*, 2 M. & Rob. 305.) Nor does it apply to a road made by turnpike trustees under an expired local act, and therefore the absence of any such certificate does not prevent such a road becoming repairable by the parish. (*Reg. v. Thomas*, 7 E. & B. 713.)

If a parish lie within two counties, and a highway lying in one part be out of repair, the indictment must not be against that part only, but against the whole; (*R. v. Clifton*, 5 T. R. 498;) though, indeed, *R. v. Weston* (4 Burr. 2507) was to the contrary. The indictment, it seems, must be preferred in that county wherein the part of the highway out of repair lies. (*R. v. Clifton*, *supra*, *Id.*)

Parish in two counties.

Where a road lay in two parishes, and no division and allotment under the 34 Geo. 3 (*infra*), had been made, it was held, that an indictment against one parish for not repairing one side of the road ought to have stated, that the parish was liable to repair *ad medium filum vice*. (*R. v. St. Pancras, Peake*, N. P. 286.)

Highway in two parishes.

Two parishes being separated by the river Tamar, *Patteson, J.*, held, that the *medium filum* was the presumptive boundary between them. (1 M. & Rob. 393.)

The following provisions of the 5 & 6 Will. 4, c. 50, which are taken from the 34 Geo. 3, c. 64, have been passed for the purpose of ascertaining the boundaries of parishes which pass across highways, and thereby enforcing the above common-law liability to repair.

Stat. 5 & 6 Will. 4, c. 50, s. 58, reciting, Whereas it frequently happens that the boundaries of parishes pass across or through the middle of a common highway, and one side of such highway is situated in one parish, and the other side in another parish, whereby great inconveniences often arise in repairing the same; enacts, That the justices at a special sessions for the highways, on complaint (b) of any surveyor of any parish, (stating in writing, and on a plan thereunto annexed, that there is such a highway, one side whereof ought to be repaired by one parish, and the other side by another and particularly describing the same by metes, bounds, and admeasurements thereof,) may issue their summons (c), with a copy of such writing and plan thereunto annexed, to the surveyor of such other parish, to appear before them on a day mentioned in such summons; and if the parties appear, such justices may then proceed finally to decide the matter, in manner herein mentioned, in case all the parties shall consent thereto; but in case the surveyor summoned shall not appear on such first summons, or appearing shall require further time, such justices shall adjourn the further consideration of the matter for any further time, not more than 21 days, nor less than 14 days from the date of such adjournment, of which the surveyor not appearing, or appearing shall require further time, shall have notice, on which day the said justices shall proceed to hear the parties and their witnesses, and whether the party summoned does or does not appear, shall proceed to examine and finally determine

Justices to determine what part shall be repaired by each parish.

(a) Sect. 105, gives a right of appeal to the quarter sessions against the decision of the special sessions. (*Reg. v. Justices of the Peace of Derby-*

shire, E. B. & E. 69.)

(b) See form, *post*, No. 11.

(c) See form, *post*, No. 12.

6. *Of the repair of highways.* the matter in form following; (that is to say), that it shall and may be lawful for such justices, and they are hereby required to divide the whole of such common highway, by a transverse line crossing such highway, into equal parts, or into such unequal parts and proportions as, in consideration of the soil, waters, floods, and inequality of such highway, or any other circumstances attending the same, they in their discretion shall think just and right, and to declare, adjudge, and order that the whole of such highway, on both sides thereof, in any of such parts, shall be maintained and repaired by one of such parishes, and that the whole thereof on both sides, in the other of such parts, shall be maintained and repaired by the other of such parishes, and shall cause such their order, and a plan of such highway, and the allotment thereof as before mentioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace (a) of the county in which such highway shall happen to lie, and shall also cause such posts, stones, or other boundaries to be placed and set up in such highway as in their judgment shall be necessary for ascertaining the division and allotment thereof: Provided, nevertheless, that in the case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices, and object to such last-mentioned proceedings, in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made and determine the same (c).

Order to be filed with clerk of peace.

Proviso in case of highway repaired by party *ratione tenuræ*, &c. (b).

Power of sessions to decide liability.

Dividing road.

It is a condition precedent to the exercise of the jurisdiction of justices, given by 5 & 6 Will. 4, c. 50, s. 58, that the road should be in the boundary line of the parishes or townships, and the proviso at the end of the section applies only to cases where the liability to repair is not at common law but *ratione tenuræ* or *clausuræ*. (*R. v. Perkins*, 19 L. J. 105, M. C.)

An order of magistrates, under 34 Geo. 3, c. 64, for dividing a road lying partly in one parish and partly in another, by a transverse line for the purpose of repair, such order pursuing the form given by that statute is conclusive as to the liability of each parish to repair the portions of road respectively allotted to them. And it is not open to either parish, on an indictment for the non-repair of the portion so allotted, to impeach the jurisdiction of the magistrates by producing evidence to prove that no part of the road ever was within such parish. (*R. v. Hickling*, 7 Q. B. 889.) A large parish consisted of two townships, G. and H., each of which had immemorially repaired the highways situate within it separately, and also of a tract called "the marsh," over which formerly there were no roads, and which was surrounded on three sides by G., and on the fourth part by a sea bank dividing it from a salt marsh anciently overflowed by the sea. Before the passing of an inclosure act, the landowners in G. and H. had rights of common over "the marsh." Under the Inclosure Act, commissioners set out a public and also a private road in "the marsh," and awarded allotments on one side of the said roads in respect of the commonable messuages, &c., in G., and on the other side in respect of those in H. "The marsh" was situate at the opposite extremity of the parish to H., and no part of it being nearer than ten miles. No repairs were ever done by G. or H. on the public road nor on the

(a) See the form of the order, *post*, No. 13.

(b) This proviso was not in the 34 Geo. 3, c. 64.

(c) This proviso is confined to the

case where the boundary is in the highway to be divided, and where the liability to repair is *ratione tenuræ* or *acclausuræ*. (*Reg. v. Perkins*, 14 Q. B. 229.)

private road until 1814, when the surveyors of G. and H. agreed to divide both the roads transversely, and that one portion should be maintained by G. and the other portion by H. On an appeal against an order of justices, under 5 & 6 Will. 4, c. 50, s. 58, dividing the roads transversely according to the agreement, the sessions confirmed the order; but the Court of Queen's Bench quashed it as being made without jurisdiction. (*Ib.*)

It seems that a material variance between the order made by the parties under this clause, and the one filed by the clerk of the peace, would be fatal to the whole proceeding. By a private inclosure act the commissioners were directed to fix and settle the boundaries of a parish in a certain manner therein specified, and to advertise in a provincial newspaper a description of the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the commissioners, and to be finally binding and conclusive. The commissioners, having fixed and settled the boundaries in the mode specified, duly advertised a description of them, but the boundaries mentioned in the award differed from those which had been advertised. It was held, that the commissioners had not pursued the authority given by the act, and that their award was not binding as to the boundaries of the parish. (*R. v. Washbrook*, 4 B. & C. 732; and *R. v. Haslingfield*, 2 M. & S. 558; and *vide ante*, p. 992.)

Sect. 59. From and after such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes, and body politic or corporate, or person aforesaid respectively, shall be bound as of common right to maintain and keep in repair such parts of such highways so allotted to them as aforesaid, and shall be liable to be proceeded against for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations and penalties contained in this act, and also shall be discharged from the repair of such part of such highway as shall not be included in their respective allotment.

Sect. 60. All costs, charges, and expenses to be incurred by reason of any of the proceedings last mentioned shall be borne and defrayed by such two parishes, or body politic or corporate, or person aforesaid, the same being settled and ascertained and duly apportioned between such parishes by such justices; and in case the said parties shall refuse or neglect to pay and discharge their respective share of such costs and expenses, it shall and may be lawful for the justices at a special sessions for the highways to levy the same by distress and sale, with costs of such distress, on the goods and chattels of any surveyor of the parish, or of any body politic or corporate, or person aforesaid, so refusing or neglecting to defray such costs and charges as aforesaid.

Sect. 61. Nothing herein contained shall extend, or be construed to extend, to affect, change, or alter in any manner whatsoever any boundaries of counties, lordships, hundreds, manors, or any other division of public or private property, nor the boundaries of any parishes or townships, otherwise than for the purpose of amending and keeping in repair such particular portion of the highway in the manner herein mentioned.

In order to charge a parish with the repair of a highway lying in another parish, some consideration must be shown, and mere prescription is not sufficient. (*R. v. St. Giles*, 5 M. & Sel. 260; *R. v. Bishop Auckland*, 1 A. & E. 744.)

Upon what terms a highway, repaired by a party *ratione tenuræ*, may be made a parish highway, see *ante*, p. 992 and p. 1001.

As to the repair of highways diverted, turned, &c., see *post*, p. 1032.

No agreement can exonerate a parish from the common law liability to repair. A count in an indictment against the corporation of Liverpool, stating that they were liable to repair a highway by virtue of a certain agreement with the owners of houses alongside of it, was held to

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.

Parishes, &c. bound to repair the part so allotted.

Costs of proceedings how defrayed, &c.

Boundary of counties, &c., not to be changed, except for the purpose aforesaid.

Charging parish with repair of highway lying out of it.

Way repairable *ratione tenuræ*.

Ways diverted, &c.

No agreement can exonerate a parish from liability to repair.

6. *Of the repair of highways.* be bad on the ground that the inhabitants of the parish, who are *primæ facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any agreement with others. (*R. v. The Mayor, &c., of Liverpool, 3 East, 86*; and see *Bac. Abr. Highways (F.) R. v. Inhab. of Scarisbrick, 6 A. & E. 509, post, p. 996.*)

Nature of repairs. The liability of the parish is confined to repairs. Therefore a parish is not by the common law bound to *widen* a road. (*R. v. Stretford, 2 Ld. Raym. 1169.*) See *post, 1030*, as to the power of justices to order roads to be widened.

Where repairs must be ineffectual. Upon the trial of an indictment for the non-repair of a road, it appeared that the road was not passable at high water, and was usually a soft sludge at ebb, the learned judge held, that the parish could not be required to do repairs which, from the nature of things, *must always be ineffectual*; and if the jury thought so, the verdict should be for the defendants. (*1 M. & Rob. 393*; *R. v. Landulph.*)

So a parish is not liable to repair a road washed away by the sea, the substance of the road being gone. (*Reg. v. Hornsea, 23 L. J. M. C. 59.*)

Cleaning. And the parish are not by the common law bound to *clean* highways; therefore it has been held not an indictable offence, that the road is very muddy, and so narrow that people cannot pass over it, without danger of their lives, unless it be out of repair. (*Reg. v. Stretford, Inhabitants of, 2 Ld. Raym. 1169.*) And the indictment must expressly aver it to be out of repair. (*Id.*)

Fences. Where an indictment alleged in the usual way, that the liege subjects could not pass and repass as they were wont and accustomed to do, and it appeared that there were precipices on the sides of the road, and no fences or guards to protect the passengers from such precipices, but there was no evidence of there having been any fences before, except that some had been put up after a former indictment; it was held, that evidence of the want of fences was not admissible, for the public were in no worse a situation than they were wont and accustomed to be before, on account of the want of fences. (*R. v. Whitney, 7 C. & P. 208.*)

2. LIABILITY OF A TOWNSHIP, OR PART OF A PARISH, TO REPAIR.

(2). Township or part of parish, when liable.

The inhabitants of a *township, district, or division of a parish* may, by *general prescription*, be liable to repair *all* highways in such township, district, or division. (*R. v. Ecclesfield, 1 B. & Ald. 348*; and see *R. v. Inhab. of Heage, 2 Q. B. 128.*) They may also be so liable by legislative provision. But they cannot be so liable *ratione tenuræ*. (*R. v. Machynlleth, 2 B. & C. 166.*) Nor can they be liable under a general prescription to repair any particular roads only, *semble*. (*R. v. Hatfield, 4 B. & Ald. 75.*)

On an appeal against an appointment of surveyor of highways for the township of K. N., the sessions found that the parish of M. consisted of two townships, M. and K. N.; that from the earliest period within living memory, in the year 1799, surveyors were appointed for these townships, one for each; that from that time, to save expense, there had been one appointment of two surveyors for the parish at large, one of them always being an inhabitant of M., and the other K. N., and that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of the highways in each; that the surveyors kept distinct accounts, but that these, as well as the rates (before they were taken to the magistrates), were examined and allowed at a general parish vestry; and that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate: it was held,

that the facts found were sufficient evidence that each township was immemorially bound to repair the roads within it, and consequently, that the appointment of surveyors of each township was proper. (*R. v. Inhabitants of King's Newton*, 1 B. & Adol. 826.)

The township, if the prescription be to repair *all* highways, will be liable to repair the old as well as new ones. (*R. v. Netherthong*, 2 B. & Ald. 179.)

This prescriptive liability, however, can never arise where the way has been made within the time of legal memory. (*R. v. Hudson*, 2 Str. 909.)

Proof of a highway, extinguished as such 60 years before, by an inclosure act, but since used by the public, and repaired by the district charged, is not sufficient to support an indictment against such district for the non-repair of such way. (*R. v. Westmark*, 2 M. & Rob. 305.)

Though, indeed, the formation of a new way does not interfere with the general prescription, nor will a recent addition of a hamlet to a township negative the prescriptive liability of a township generally. (*R. v. Oswestry*, 6 M. & Sel. 361.)

The prescription being ancient, and without interruption, is presumed to have had its origin by licence on an inquisition of *ad quod damnum*, or other legal commencement.

Where, in an indictment against a township for the non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large, it was held, that this placed the township in the situation of a parish, and that it was necessary for the defendants to show by evidence some other persons in certainty who were liable, in order to deliver themselves from their liability to repair. (*R. v. Hatfield*, 4 B. & Ald. 75.)

But a private agreement amongst the inhabitants, not being ancient, nor confirmed on an inquisition of *ad quod damnum*, that some of the inhabitants shall repair one part of the highway, and some of them another part, is not good: it may be binding amongst the parties thereunto, so as, on a breach thereof, one party may have an action upon the case against the other; but with respect to the public, they continue equally liable as before; for such private agreement cannot alter the law. (*R. v. The Mayor, &c., of Liverpool*, 3 East, 86. As to the inadmissibility of such an agreement upon an indictment against a parish for non-repair, see *R. v. Inhabitants of Scarisbrick*, 6 Ad. & E. 509.)

By private agreement.

Where, in an appeal against a highway rate for the parish of W., it was proved that the hamlet of M. formed part of the parish of S., but the lands in M. had never been assessed to the highway rates of S., nor had S. ever repaired, or contributed to the repair, of the highways in M., and that from 1828 to 1841, by living testimony, and previously by evidence of reputation, it appeared that highway-rates were assessed upon the lands in M. by the neighbouring parish of W. jointly with the lands in W. and the highways in M. were repaired by the surveyors of W. out of such rates, jointly with the highways in W. without any distinction; and further that, since 1841, by private arrangement between M. and W., M. ceased to be assessed to the highway rates of W., and the occupiers in M., by arrangement amongst themselves, repaired the highways in M. without any rate or assessment being made. It was held that a part of one parish could not legally be united to another parish for the purpose of the repair of the highways, and that no continuing consideration was shown on the part of S. so as to create a liability on the part of W. to repair the highways in M. being part of S.; and that there was no sufficient evidence to draw the inference of fact that M., though part of S., had been

6. *Of the repair of highways.* originally a hamlet repairing its own highways. That there was therefore no sufficient ground of exemption shown by the hamlet of M. to avoid its *prima facie* liability to contribute to the highway-rates of the parish of S., of which it formed part. (*Dawson v. Surveyor of Willoughby*, 34 L. J. M. C. 37.)

Where township exempted by statute.

If the inhabitants of a township, who were bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. (*R. v. Sheffield*, 2 T. R. 106, *ante*, p. 989.)

Indictment against.
Plea.

As to the indictment against a township, or part of a parish, for the non-repair of a highway, see *post*, "*Proceedings for Non-repair.*"

And as to a plea that a township, &c., is liable to repair a highway, see *post*, "*Proceedings by Indictment for Non-repair.*"

3. THE LIABILITY OF AN EXTRA-PAROCHIAL PLACE TO REPAIR.

(3). Liability of extra-parochial place to repair.

It is open to discussion, whether an extra-parochial place is subject to the same liability to repair roads as a parish, although the court, in assuming that it was, held, that an indictment stating that a certain way was an ancient highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair, was bad for want of an allegation that the inhabitants of the hamlet were immemorially bound to repair, and that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair. (*R. v. Kingsmoor*, 2 B. & C. 190. See *Wellb.* 79.)

4. LIABILITY OF INDIVIDUALS TO REPAIR IN RESPECT OF INCLOSURE.

(4). When individuals in respect of inclosure liable to repair.

A man may be bound to the repair of a highway in respect of an inclosure of the land wherein it lies; as, where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides thereof; in which case he is bound to make a perfect good way, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective; because, before the inclosure, the people used, when the way was bad, to go for their better passage over the fields adjoining, out of the common tract, which liberty is taken away by the inclosure. (1 *Haw. c.* 76, s. 6; *Duncombe's case*, *Cro. Car.* 366; 2 *Saund.* 161 n; *R. v. Flecknow*, 1 *Burr.* 461; *ante*, p. 985.)

And if the way is not sufficient, any passenger may break down the inclosure, and go over the land, and justify it, till a sufficient way be made. (*Anon.* 3 *Salk.* 182.)

Also it hath been holden, if one inclose land on one side, which hath been anciently inclosed on the other side, he ought to repair all the way; but if there be not such an ancient inclosure on the other side, he ought to repair but half the way. (1 *Haw. c.* 76, s. 7.) Therefore, if there be an old hedge time out of mind on one side of the way, and a person having land on the other side make a new hedge, such person shall be charged with the whole repair. (*R. v. Stoughton*, 2 *Saund.* 160.)

But if one person make a hedge on one side of the way, and another person make a hedge on the other side of the way, they shall be chargeable to the repair thereof by moieties. (*Ib.*)

When freed from such charge.

But it is said that wherever one is bound to repair a highway, or part thereof, in respect of an inclosure, and he lays it open again as it was before, he shall be freed from the charge of such repair. (1 *Haw. c.* 76, s. 7; *R. v. Stoughton*, 2 *Saund.* 160; *Amb.* 295; *R. v. Flecknow*, 1 *Burr.* 461.) But to relieve such person by such act, he must prove that the obligation to repair arose from encroachment. And where defendant removed an archway, which he called an encroach-

ment, and the cause of his liability to repair, he was held still to be liable, as it was proved that the archway had been removed for 25 years; that the defendant had ever since repaired the road; and that, previously to its removal, it had been there longer than any living person could remember. (*R. v. Skinner*, 5 *Esp. R.* 219.)

6. *Of the repair of highways.*

The liability to repair *ratione tenuræ* is only upon the occupier not the owner of the inclosed land, and the liability does not attach where the way is not immemorial, or where the land has not been used for pasture before the inclosure. (*R. v. Ramsden*, 27 *L. J. M. C.* 296.)

Upon an indictment against the occupier of a certain field for non-repair of a particular road, it is conclusive evidence that a former owner of the same field was convicted for non-repair of the same road, the liability being charged as arising in respect of the tenure of such field. (*Reg. v. Blackmore*, 21 *L. J. M. C.* 60.)

Where a highway is inclosed under the authority of an act of Parliament for dividing and inclosing common fields, the person who incloses the way is not bound to repair it. (*R. v. Flecknow*, 1 *Burr.* 461; and *R. v. Commissioners of Llandillo*, 2 *T. R.* 232.) And the commissioners cannot direct the inhabitants to maintain private roads set out by them. (*R. v. Cottingham*, 6 *T. R.* 20.)

When not liable.

Whether, in the case of footpaths, all stiles between different inclosures must be kept in good repair by the occupier of the field, see *R. v. Watts*, 1 *Salk.* 357, *pl.* 3.

Stiles.

5. LIABILITY OF INDIVIDUALS, &C., TO REPAIR BY PRESCRIPTION, &C.

A particular person may be bound to repair a highway in respect of a particular prescription; and it is said, that a corporation aggregate (a) may be compelled to do it, by force of a general prescription; that it ought and hath used to do it, without showing that it used to do so in respect of the tenure of certain lands, or for any other consideration: because such a corporation, in judgment of law, never dies; and therefore, if it were ever bound to such a duty, it must needs continue to be always so; neither is it any plea, that such a corporation have always done it out of charity, for what it hath always done, it shall be presumed to have been always bound to do. But it is said, that a person cannot be charged with such a duty by a general prescription from what his ancestors have done, unless it be for some special reason, as the having lands descended from such ancestors, which are holden by such like service. (1 *Haw. c.* 76, s. 8; *Bac. Ab. Highways, F.*; see *R. v. St. Giles*, 5 *M. & Sel.* 260; and see *post*, "*Proceedings for not Repairing Highways.*")

(5). Repairs by individuals, &c. by prescription, &c.

An individual, who is charged with repairs *ratione tenuræ*, cannot excuse himself by a plea, that the grantor conveyed the lands to him discharged of the burden (2 *Saunders*, 159); and the tenant of each part of the land is liable to the whole burden; and if the crown becomes the owner of them, and grants any part of them, the obligation to repair will revive, and the grantee be liable. (*Regina v. D. of Buccleugh*, 1 *Salk.* 358.)

The owner of land, however, is not bound to repair a new road made by virtue of a writ of *ad quod damnum*; but the parish is liable, because their labour is transferred only from the old to the new road (b). But if the new road lies in a different parish from

is their duty to repair.

(b) See the enactment in 5 & 6 Will. 4, c. 50, as to new highways being kept in repair by parishes, *ante*, p. 992.)

(a) See *R. v. Birmingham and Gloucester Railway Company*, 9 *Car. & P.* 469, where it was held that a corporation aggregate is liable to be indicted for breaches of duty, such as the non-repair of bridges, which it

6. *Of the repair of highways.* the old, he who sues out the writ must make and repair the road (*Ex parte Vennor*, 3 *Atk.* 771, and *post*, p. 1042); though the mere fact of making a road will not render the maker liable to repair. (*R. v. Wood*, Cro. 266.) Here, the writ had been sued out, but no licence granted.

See *ante*, tit. "*Bridges*," as to an infant being liable to be indicted for the non-repair of a bridge. (And see *R. v. Sutton*, 3 *Ad. & E.* 597.)

See, also, *ante*, tit. "*Bridges*," as to whether an owner, who is not the occupier of lands charged with the repair of a bridge, can be indicted for not repairing it. And as to the onus of the repair of a bridge *ratione tenuræ* falling ultimately upon the owner of the land, and not upon the occupier.

From when liability to repair *ratione tenuræ* must have existed.

It seems doubtful whether a liability to repair *ratione tenuræ* must have existed from time immemorial, or whether it may not arise at the time of the construction of the road, upon a sufficient consideration. (See *R. v. Inhabitants of Scarisbrick*, 6 *A. & E.* 509; *Callis on Sewers*, 117; *Porter's case*, 1 *Rep.* 26 a.; *Mayor, &c., of Lyme Regis v. Henley*, 3 *B. & Ad.* 77; 1 *Bingh. N. S.* 222.)

The township of S. was indicted for not repairing a road in S., on a custom alleged and proved, that all the townships in the parish in which S. was situate repaired their own roads in general. In answer, it was shown that the township of N., in another parish, was adjacent to S.; and that an agreement had been made, two hundred and fifty years before, between the then owner of all S. and the then owner of all N., whereby the boundary between the properties was marked out, and the owner of S. agreed to allow to the owner of N., and the rest of the inhabitants of N., a road through S., of which S. was to repair part, and N. another part, being the subject of the indictment; and that further assurance for the performance of the agreement should be made by a sufficient lawyer. It was also shown, that afterwards the owner of S. filed a bill for specific performance against the owner of N., the event of which did not appear; but that the owners of land in N. had ever since repaired in conformity with the agreement:—Held, not to be evidence for a jury of an instrument binding the owner of N., and all claiming through him, to repair, assuming that such a conveyance could have been made so as to exonerate the inhabitants of S. (*R. v. Inhabitants of Scarisbrick*, *supra*, p. 997.)

From *R. v. Hayman* (1 *M. & M.* 401), it would seem that the liability must have existed from time immemorial. In that case it was held to be a good defence to an indictment charging a defendant with the repair of a highway *ratione tenuræ* in respect of a mill, that the mill originated within the time of legal memory. (And see *R. v. Hatfield*, 4 *B. & Ald.* 75, and 1 *Hawk. c.* 76, s. 8.)

Reputation no evidence to prove such liability.

Evidence of reputation is not admissible to prove a liability to repair *ratione tenuræ*. (*R. v. Inhabitants of Wavertree*, 2 *M. & Rob.* 353. See *R. v. Cotton*, 3 *Camp.* 444.)

Indictment for not repairing.

As to the indictment against an individual for not repairing a road, see *post*, p. 1073.

Liability to repair of part of a parish.

As to the inhabitants of a district or division in a parish or township being liable by prescription to repair all highways in the district, see *ante*, p. 996.

Of parish where highway is not situate.

As to a parish being liable, upon a consideration, by prescription to repair highways in another parish, see *ante*, p. 995.

Of extra-parochial hamlet.

As to an extra-parochial hamlet being liable by prescription to repair roads within it, see *ante*, p. 998.

Indictments for non-repair in these cases.

And as to the indictments for non-repair in these cases, see *post*, p. 1073.

As to the repair of roads after they have been diverted, turned, &c., see *post*, p. 1042.

The trustees of turnpike roads have a power to negotiate with persons bound to repair roads within their trust, for the repair of the same. (3 Geo. 4, c. 126, s. 106, *post*, "*Highways, Turnpike.*")

By 5 & 6 Will. 4, c. 50, s. 62, any body politic or corporate, or any person, liable to repair any highway by reason of tenure of any lands, or otherwise howsoever, or the surveyor of the parish in which the said highway is situate, may, if he or either party shall think proper, having first obtained the consent of the inhabitants in vestry assembled, apply to any justice for the purpose of making the said highway a parish highway, and to be repaired by the surveyor of the said parish (a); and the said justice is hereby authorised and required to issue his summons, requiring the said surveyor, or the party so liable to repair the said highway as aforesaid, to appear before the justices at the next special sessions for the highways, and if both parties appear, such justices may then proceed to determine the matter; but in case the surveyor or party summoned shall not appear on such first summons, or appearing shall require further time, such justices shall adjourn the further consideration of the matter to the next special sessions for the highways, of which the said surveyor or party not appearing shall have notice, on which day the justices so assembled at such special sessions shall proceed to hear the parties and their witnesses, and, whether the surveyor or party summoned do or do not appear, shall proceed to examine and determine the matter; and in case they decide that the said highway shall become a parish highway, and be thereafter repaired by the surveyor of the said parish, they shall, by an order under their hands, fix the proportion of the expenses of repairing the said highway to be annually paid by such body politic or corporate, or person as aforesaid, to the surveyor of the said parish; and the order of the said justices shall be binding on the surveyor and the said parish, and the said body politic or corporate, or person as aforesaid, their heirs, successors, and assigns: Provided nevertheless, that the said justices, instead of fixing the proportion of the expenses of repairing the said highway to be annually paid as aforesaid, may, by an order under their hands, fix a certain sum to be paid by such body politic or corporate, or person as aforesaid, to the surveyor of the said parish, in full discharge of all claims thereafter in respect of the repairs of such highway; and in default of payment of such last-mentioned sum, or of such annual sum as aforesaid, the said surveyor may proceed for the recovery thereof in the same manner as any penalties and forfeitures are recoverable under this act: Provided always, that when the sum so fixed to be paid in full discharge of all claims thereafter in respect of the repair of such highways shall exceed the sum of 100%, the said sum when received shall be vested, in the name of the minister, churchwardens, and surveyors of the highways of the parish within which such highway shall be situate, in some public government securities, and the interest and dividends from time to time arising or accruing therefrom shall be applied towards the repairs of the highways within the said parish: Provided also, that when the sum so fixed to be paid in full discharge of all claims as aforesaid shall not exceed the sum of 100%, the said last-mentioned sum or any part thereof, on the application by and with the consent of the inhabitants of the parish in vestry assembled, and of the justices in special sessions assembled, shall and may be paid to the surveyor of the said parish to be applied towards the repair of the highways within the said parish.

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50. Repair of roads, diverted, &c.

Negotiation with trustees of turnpike roads.

Highway repaired by party ratione tenuræ, &c., may be made a parish highway.

(a) See further provisions in 25 & 26 Vict. c. 61, s. 35, *post*, p. 1113.

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.
(6). As to repair of highways adjoining, &c., bridges hereafter to be built.

Raised causeways and walls, &c., of the bridge.

6. REPAIR OF ROADS PASSING OVER, &C. BRIDGES.

By the 5 & 6 Will. 4, c. 50, s. 21, if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: Provided nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways, and raised approaches to any such bridge, or the land arches thereof.

All public bridges, not being county bridges, are by the common law in general repairable by the inhabitants of the parish wherein they lie, like other highways; and the above clause makes no alteration in the law in this respect as to county bridges built before the passing of the above act. The interpretation clause, s. 5, (*ante*), expressly excepts a county bridge from the definition of a highway. (See fully as to the repairs of county bridges, *ante*, "*Bridges*.")

The inhabitants of a county are bound to repair to the extent of 300 feet of the highway at each end of a county bridge built before the 20th March, 1836. See "*Bridges*."

By sect. 22 of the 5 & 6 Will. 4, c. 50, the powers thereby vested in the surveyor of highways as well for the getting of materials as the preventing and removing of nuisances, &c., are vested in the surveyor of county bridges, &c., and such materials are exempt from toll. 3 Geo. 4, c. 126, s. 32.

7. BOARD FOR REPAIR OF HIGHWAYS.

(7). Appointment of a board directing repairs in large parishes.

By 5 & 6 Will. 4, c. 50, s. 18, reciting that it is expedient in large and populous parishes that the repairs of the highways should be under the direction and control of a certain number of inhabitants, to be chosen and appointed as a board for that purpose, with necessary powers; it is enacted, that in any parish where the population by the then last census, taken from the returns made to Parliament, exceeds the number of five thousand, if it shall be determined by a majority (a) of two-thirds of the votes of the vestrymen present at such meeting as aforesaid, to form a board for the superintendence of the highways of the said parish; and for the purpose of carrying the provisions of this act into effect, it shall be lawful for the said vestry to nominate and elect any number of persons, not exceeding twenty nor less than five, being respectively householders and residing in and assessed to the rate for the relief of the poor of the said parish, and also liable to be rated to the repair of the highways in the said parish under and by virtue of this act, to serve the office of surveyors of the highways for the year ensuing (b); and such persons so to be nominated and elected as such surveyors, or any three of them, shall and are hereby authorised to act as a board, and to be called "The board for repair of the highways in the parish of —," (as the case may be), and to carry into effect the powers, authorities, and directions in this act contained; and such board are hereby authorised to appoint a collector, or any number of collectors, of the rates to be made under the authority of this act, and also to employ a person of skill and experience to

Powers of the board.

(a) Under this section the minority of vestrymen present at a meeting to form a highway board have the right to demand a poll, and if such demand

be not complied with, the members of the board are not legally appointed. (*Reg. v. How*, 33 L. J. M. C. 53.)

(b) See form of notice, *post*, No. 6.

act as an assistant surveyor to the said board, and also a clerk to attend the said board, and to keep the accounts and minutes of the proceedings thereof; such assistant surveyor and clerk to be paid such reasonable salaries out of the said rates as the said board shall determine; and upon such board being so nominated and elected as aforesaid all and every the powers and authorities given and created by this act, and granted to or vested in the vestry, and in any person or persons as surveyor, shall, for the purposes of the parish so nominating and electing such board, be and the same are hereby declared to be vested in the said persons so to be elected, or any three of them acting as such board as aforesaid; and such persons or any three of them, at a meeting to be convened for that purpose, may and they are hereby authorised to nominate and appoint a fit and proper person to be treasurer for the deposit of the monies to be collected for the purposes of this act, and to take from such person good and sufficient security for the monies to be deposited in his hands as aforesaid (a); and all monies to be drawn from such treasurer for the purposes of this act shall be drawn by drafts or cheques to be signed by the said persons so to be nominated and elected as aforesaid, or any three of them, at some one of their meetings to be held under this act, and such drafts shall be respectively signed and entered in their books by the said clerk to be appointed as aforesaid: Provided always, and it is hereby declared, that upon the expiration of the year for which such board shall be elected as aforesaid, and before or on the day for the nomination and election of persons as surveyors under the authority of this act, the said board shall and are hereby directed to present to the vestry of the parish for which they shall have acted copies of all their accounts and also of the minutes of their proceedings during the preceding year.

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.

Board to present to vestry copies of their accounts, &c.(b).

If a parish consist of several tithings, each of which has immemorially repaired its own highways, the parish cannot form a board under this section. Rates made by such a board, although separately for each tithing, would be bad. (*R. v. Bush*, 9 A. & E. 820.)

An assistant surveyor appointed under this section is not liable to a penalty under s. 44 for not making out his accounts and laying them before justices at the special sessions for highways; for his functions do not include those of an accountant. (*Adams v. Lakeman*, E. B. & E. 615.)

8. POWER FOR BOARD TO HIRE, &C. PREMISES FOR KEEPING OF MATERIALS, &C., AND TO DIRECT HOW HIGHWAYS ARE TO BE PAVED.

By 5 & 6 Will. 4, c. 50, s. 19, it shall and may be lawful to and for such board to rent, or with the consent of the vestry of any parish to purchase, a fit and convenient piece of ground or other premises for the keeping of the implements and materials necessary for the reparation of the highways, or for the preparing the materials for the same respectively, and to determine and direct how and in what manner the highways in the said parish, or any or either of them, or any and what part or parts thereof, shall be curbed or paved with stone or otherwise.

(s). Board may hire or purchase premises for keeping of materials, &c.;

and may direct how highways are to be curbed or paved.

As to obtaining materials for repairs, &c. see *post*, p. 1005.

(a) The giving security is not, it would seem, a condition precedent either to the enjoyment of the office or to the liability to account for the monies received by the treasurer. (*R.*

v. Patteson; 4 B. & Ad. 9.)

(b) This section is not to apply to parishes within highway districts formed under 25 & 26 Vict. c. 61.

6. *Of the repair of highways.*

5 & 6 Will. 4, c. 50.

(9). Direction-posts, where and how to be erected.

Boundary posts.

Flood posts.

Causeways to be secured.

Surveyor to be reimbursed his expenses.

9. DIRECTION-POSTS, FLOOD-POSTS TO BE ERECTED, AND CAUSEWAYS TO BE SECURED FROM CARRIAGES, &C.

By 5 & 6 Will. 4, c. 50, s. 24, the surveyor of every parish, other than a parish the whole or part of which is within 3 miles of the General Post Office in the city of London, shall, with the consent of the inhabitants of any parish in vestry assembled, or by the direction of the justices at a special sessions for the highways, cause (where there are no such stones or posts) to be erected or fixed in the most convenient place where two or more ways meet, a stone or post, with inscriptions thereon in large legible letters not less than one inch in height and of a proper and proportionate breadth, containing the name of the next market town, village, or other place to which the said highways respectively lead, as well as stones or posts to mark the boundaries of the highway containing the name of the parish wherein situate; and that the surveyor of every parish shall, at the several approaches or entrances to such parts of any highways as are subject to deep or dangerous floods, cause to be erected graduated stones or posts, as he shall judge to be necessary, for the guiding of travellers in the best and safest track through the floods; and also to secure horse causeways and foot causeways, by posts, blocks, or stones fixed in the ground, or by banks of earth cast up or otherwise, from being passed over and spoiled by waggons, wains, carts, or carriages; and the said surveyor shall be reimbursed out of the monies which shall be received by him pursuant to the directions of this act, the expenses of providing and erecting and of keeping in repair such stones, posts, or blocks already erected or fixed, or which may hereafter be erected or fixed (*a*).

This section only relates to foot or horseways by the side of carriage-ways, and does not compel surveyors of parish highways to protect by posts or otherwise the entrance of foot or horseways from carts or carriages, and per *Willes, J.* It is for the parties who own the soil at the end of the way to protect it from trespassers. (*Ellis v. Woodbridge*, 29 *L. J. M. C.* 183.)

10. GROUNDS ADJOINING ROADS, EXCEPT GARDENS, &C., MAY BE USED AS A TEMPORARY ROAD.

(10). Power to use adjoining ground as a temporary road.

Recompense to be made to proprietor of such ground.

By 5 & 6 Will. 4, c. 50, s. 25, it shall be lawful for the surveyor to make a road through the grounds adjoining to any ruinous or narrow part of any highway, (not being the site or ground whereon any house stands, nor being a garden, lawn, yard, court, park, paddock, plantation, planted walk or avenue to any house, or inclosed ground set apart for building ground, or as a nursery for trees), to be made use of as a public highway whilst the old road is repairing or widening, making such recompense to the proprietor and occupier of such grounds for the damages they may thereby sustain as the justices at a special sessions (*post*, p. 1043) for the highways assembled may think reasonable, such sum so awarded as a recompense to be recoverable in the same manner as any fines and forfeitures are recoverable under this act (*b*).

As to the mode of recovering such penalties, see ss. 101, 103, &c., *post*, p. 1088.

(*a*) See a similar provision as to posts, in the turnpike act, 3 Geo. 4, c. 116, s. 119, *post*, "*Highway, Turnpike*." See form of precept of justices for erecting guide-posts, &c., *post*,

No. 7.

(*b*) As to the public having a right to go over adjoining ground when road impassable, see *ante*, p. 985.

11. SURVEYOR TO REMOVE OBSTRUCTIONS FROM SNOW OR FALLING DOWN OF BANKS, &c.

By 5 & 6 Will. 4, c. 50, s. 26, if any impediment or obstruction shall arise in any highways from accumulation of snow, or from the falling down of the banks on the side of such highways, or from any other cause, the surveyor is required from time to time, and within 24 hours after notice (a) thereof from any justice of the peace of the county in which the parish may be situate, to cause the same to be removed.

7. *Materials for repairs.*

5 & 6 Will. 4, c. 50.
(11). Surveyor to remove snow, &c.

VII. *Materials for Repairs.*

Herein of—

Division of subject.

1. *The Contract for, by the Surveyor*, p. 1005.
2. *The Penalty for taking away Materials of Surveyor*, p. 1005.
3. *The Sale of Lands allotted for*, p. 1006.
4. *Of renouncing the Compensation for Damages*, p. 1007.
5. *The power of Trustees of Lands given for Maintenance of Highways to grant Leases*, p. 1008.
6. *The mode of getting Materials, and Surveyor's duty as to*, p. 1008.

As to rate-payers dividing amongst themselves the carrying of materials, see the 35th section, *post*, p. 1026.

1. CONTRACT FOR BY SURVEYOR.

By 5 & 6 Will. 4, c. 50, s. 46, in every parish the surveyor may and is hereby authorised, with the consent of the inhabitants in vestry assembled, to contract for purchasing, getting, and carrying the materials required for the repair of the highway; and if any surveyor shall have any part, share, or interest, directly or indirectly, in any contract or bargain for work or materials to be made, done, or provided upon, for, or on account of any of the highway or other works whatsoever under his care or management, or shall upon his own account, directly or indirectly, use or let to hire any team, or use or sell or dispose of any materials, to be used or employed in making or repairing such highway or other works as aforesaid, (unless a licence in writing for the sale of any such materials, or to let to hire any such team, be first obtained from two justices of the peace in special sessions, assembled), he shall forfeit for every such offence, on conviction, any sum not exceeding 10*l.*, and be for ever after incapable of being employed as a surveyor with a salary under the authority of this act. Surveyor may contract for getting and carrying materials (b); but not to share in any contract, or let to hire any team, or dispose of any timber, stones, &c., without licence from two justices.

By the 27 & 28 Vict. c. 101, s. 20, it is enacted that this section is not to apply to the highway board of any highway district, or to any highway within a highway district.

2. PENALTY FOR TAKING AWAY MATERIALS, &c.

By 5 & 6 Will. 4, c. 50, s. 47, If any person shall, without the consent of the surveyor, take away materials which shall have been purchased, gotten, dug, or gathered for the repair or use of any highway, or any materials out of any quarry which shall have been made, dug, or opened for the purpose of getting materials for any highway, before

Penalty on taking away materials belonging to surveyor.

(a) See form, *post*, No. 8.

(b) See s. 35, *post*, p. 1026, as to

rate-payers dividing amongst themselves the carrying of materials.

7. *Materials for repairs.*

5 & 6 Will. 4, c. 50.

the surveyor and his workmen shall have discontinued working therein for the space of 6 weeks (except the owner of any private grounds, and persons authorised by such owner to get materials in such quarry for his own private use, and not for sale), every person so offending shall for every such offence forfeit and pay, on conviction thereof, any sum not exceeding 10*l.* (a).

As to indictments or information touching any materials, tools, &c., provided for the repair of the highways, &c., see 41, *post*, p. 1017.

3. SALE OF LANDS ALLOTTED FOR MATERIALS.

Land allotted to the parish for materials, when exhausted, may be sold.

By 5 & 6 Will. 4, c. 50, s. 48, reciting that, under acts of parliament heretofore made and which may hereafter be made for the inclosing of waste land, parcels of land have been and may be expressly allotted to parishes or to the surveyor of the highways for the purpose of obtaining materials for the repair of the highways in such parish, and the materials in such parcels of land have been and may be exhausted; it is enacted, that in such cases it shall and may be lawful for the surveyor of such parish for the time being, by and with the consent of the vestry, and he is hereby authorised and required, with the consent in writing of the justices of the peace at a special sessions for the highways, to sell and convey to some person whose lands adjoin thereto, or, if he refuse to purchase, to any other person, the said parcels of land from which the said materials have been so exhausted as aforesaid, at and for such price as the said justices may deem fair and reasonable, and with the money arising therefrom, and with such consent as aforesaid, to purchase other lands in lieu thereof (b).

Extension of 5 & 6 Will. 4, c. 50, s. 48, as to sale of lands.

By 8 & 9 Vict. c. 71, s. 1, after reciting 5 & 6 W. 4, c. 50, s. 48, it is enacted that, from and after the passing of this act, the recited act, and all the provisions therein contained, shall apply and extend not only to the lands in the said act specified, but to all lands belonging or which hereafter may belong to parishes, or to the surveyor of the highways, for the purposes aforesaid, which have been or hereafter shall be lawfully used for the purpose of obtaining materials for the repair of the highways in such parish, the materials in which lands have been or hereafter may be exhausted.

It would seem that a sale to the surveyor would not be bad, if made without fraud (*R. v. Justices of Cambridgeshire*, 4 *Ad. & E.* 111), though of course it would be better that a surveyor should not be a purchaser in his own year.

Premises for keeping materials.

As to the power of board for the repair of highways to hire or purchase premises for keeping of materials, &c., see *ante*, p. 1003.

4. COMPENSATION FOR DAMAGES MAY BE RENOUNCED.

Tenant for life, &c., may renounce damages.

By 5 & 6 Will. 4, c. 50, s. 49, it shall be in the power of tenants for life, ecclesiastical and lay corporations, and the proprietors of entailed estates, and of the trustees and guardians of any person under any legal disability or incapacity, to give up and renounce every claim of damage or compensation for such ground and materials as any highway may occupy on their respective properties, and that such renunciation shall be equally binding on the heirs and successors of such persons: provided nevertheless, that such renunciation of claim of damage or compensation be in writing, and signed by such tenant for life, proprietor, trustee, or guardian, in the presence of two witnesses, or in the case of corporations in such manner and form as is usually adopted by such corporations respectively (c); and such renunciation

(a) See the turnpike act, 3 Geo. 4, c. 126: under that the fine is only 5*l.*

(b) See a provision in the turnpike act, 3 Geo. 4, c. 126, something like

this, *post*, "*Highways, Turnpike.*"

(c) See *Bro. Corp.* 51; *Taylor v. Dulwich Hospital* (1 *P. Wms.* 655).

shall be enrolled at the quarter sessions which shall be held next after the signing or execution thereof.

5. POWER OF TRUSTEES OF LANDS GIVEN FOR MAINTENANCE OF HIGHWAYS TO GRANT LEASES. 7. *Materials for repairs.*
5 & 6 Will. 4. c. 50.

By 5 & 6 Will. 4, c. 50, s. 50, when any lands or tenements have been or shall be given for maintenance of highways, the profits and proceeds of which are to be applied and disposed of for no other use, intent, or purpose whatsoever, all persons who are or shall be enfeoffed or trusted with any such lands or tenements shall, and they are hereby authorised and required to let them to farm at the most improved yearly value, without fine, for any term not exceeding 99 years: provided nevertheless, that previous to the granting of such lease the consent of two justices at a special sessions for the highways, neither of such justices being interested therein, by writing under their hands, shall be obtained as to the amount of rent to be received* and the duration of the term. (See the saving of the rights of colleges, 5 & 6 Will. 4, c. 50, s. 114.)

Persons enfeoffed with lands for maintenance of highways, &c., shall let them to farm at the most improved value, with consent of justices.

* Sic in act; sed quære, if it ought not to be "re-served."

6. MODE OF GETTING MATERIALS BY SURVEYORS, AND THEIR DUTIES AS TO.

By 5 & 6 Will. 4, c. 50, s. 51, it shall and may be lawful for every such surveyor, in any waste land or common ground, river or brook, within the parish for which he shall be surveyor, or within any other parish wherein gravel, sand, stone, or other materials are respectively likely to be found (in case sufficient cannot be conveniently had within the parish where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish), to search for, dig, get, and carry away the same, so that the said surveyor doth not thereby divert or interrupt the course of such river or brook, or prejudice or damage any building, highway, or ford, nor dig or get the same out of any river or brook within the distance of 150 feet above or below any bridge, nor within the like distance of any dam or wear; and likewise to gather stones lying upon any lands or grounds within the parish where such highway shall be, for such service and purpose, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways, without making any satisfaction for the said materials, but satisfaction shall be made for all damages done to the lands or grounds of any person or persons by carrying away the same, in the manner hereinafter directed for getting and carrying materials in inclosed lands or grounds (see sect. 54. *post*, p. 1008); but no such stones shall be gathered without the consent of the owner of such lands or grounds, or a licence (a) for that purpose from two justices at a special sessions (*post*, p. 1043) for the highways, after having summoned such owner to come before him,† and heard his reasons, if he shall appear and give any, for refusing his consent (b).

Materials where and in what manner to be taken by surveyors.

Power to gather stones without making satisfaction, but satisfaction to be made for damages done by carrying them away.

† Sic, but read "them."

Sect. 52. Provided always, that nothing in this act contained relative to the gathering or getting of stones or other materials shall extend to any quantity of stones or other materials thrown up by the sea, commonly called beach, where the removal of the same would cause any damage or injury by inundation to the lands adjoining, or increased danger of encroachment by the sea.

Not to extend to sea-beach, &c.

Sect. 53. It shall not be lawful for any surveyor, or any other person acting under the authority of this act, to dig, gather, get, take, or

Notice to be given before materials are taken from inclosed lands.

(a) See form of licence, *post*, No. 9.

(b) Whether the inhabitants of a parish have the right to take stones

for the repair of the highways from the waste adjoining the sea shore. (See *Padwick v. Knight*, 7 Ex. 854.)

7. *Materials for repairs.*

5 & 6 Will. 4, c. 50.

If occupier shows cause against removal, two justices to decide thereon.

If sufficient materials cannot be found in waste lands, &c., surveyor may take them from the several or inclosed lands or grounds, making satisfaction to owners.

carry away any materials for making or repairing any highway out of or from any inclosed land or ground (a), until 1 calendar month's notice in writing, signed by the surveyor, shall have been given to the owner of the premises from which such materials are intended to be taken, or to his known agent, and to the occupier of the premises from which such materials are intended to be taken, or left at the house or last or usual place of abode of such owner or agent, and also of such occupier, to appear before the justices at a special sessions for the highways, to show cause why such materials shall not be had therefrom; and in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not show sufficient cause to the contrary, such justices shall, if they think proper, authorise such surveyor or other person to dig, get, gather, take, and carry away such materials at such time or times as to such justices shall seem proper (b); and if such owner, agent, or occupier shall neglect or refuse to appear by himself or his agent, the said justices shall and may (upon proof, on oath, of the service of such notice) make such order therein as they shall think fit as fully and effectually to all intents and purposes as if such owner or occupier, or his agent, had attended. (See a similar enactment contained in the turnpike act, 3 Geo. 4, c. 126, s. 98; and decisions upon it under "*Highways Turnpike*.")

Sect. 54. It shall be lawful for every such surveyor, for the use aforesaid, by licence in writing from the justices at a special sessions for the highways (c), to search for, dig, and get materials, if sufficient cannot be had conveniently within such waste lands, common grounds, rivers, or brooks, in or through any of the several or inclosed lands or grounds (d) of any person whomsoever (such lands or grounds not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or inclosed wood not exceeding 100 acres in extent), within the parish where the same shall be wanted, or within any other parish adjoining (c) or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot be conveniently had in the parish where such highways lie, or in the waste lands or common grounds, rivers, or brooks of such adjacent parish, and that a sufficient quantity of materials will be left for the use of the parish where the same shall be, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the materials which may be got or taken away, and also for the damage done to such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a special sessions for the highways.

Under the 27th section of statute 13 Geo. 3, c. 78, which corresponds *verbatim* with the latter branch of the 51st section of the 5 & 6 Will. 4, c. 50, where surveyors had broken a new way over the plaintiff's land, in order to carry materials for repair, in a case where an old but circuitous road existed before, and had after the damage done, and after an action of trespass brought against them, paid money into court by way of amends; it was held, that the sufficiency of such

(a) By the 4 & 5 Vict. c. 51, s. 1, it is enacted, "that from and after the passing of this act all lands and grounds which shall be in the exclusive occupation of one or more persons for agricultural purposes shall be deemed and taken to be inclosed lands or grounds within the meaning

of the said recited acts, although the same may not be separated from any adjoining lands or grounds of other persons, or from the highway, by any fence or other inclosure."

(b) See form, *post*, No. 9.

(c) See form of licence, *post*, No. 10.

(d) See note (a), *supra*.

amends could not be questioned at *Nisi Prius*, the 29th section of that act in terms differing slightly from those of this section, having declared that if the parties could not agree as to the sufficiency of amends, "then such satisfaction and recompense shall be settled and ascertained, by order of one or more justice or justices of the peace, of the limit where such land or ground shall lie. But it seems to be competent to the plaintiff in such action to show that the making of such new road over his land was maliciously or wantonly done by the surveyors, and not for the necessary or convenient carriage of the materials over the land for the purposes of the act, and in such case he would be entitled to recover damages by the verdict of a jury. (*Boyfield v. Porter*, 13 *East*, 200.)

Lord *Ellenborough*, C. J., held, in the same case, that the convenience of the case, as well as the words of the act, required that the satisfaction should be made subsequent, and not antecedent, to the damage committed, for the mere difference of the weather, whether wet or dry during the continuance of the operation, might make great difference in the amount of the injury done to the land, and in the consequent compensation.

Upon a repealed statute (29 Geo. 2, c. 67), the following decisions took place; *viz.* :—

That the order of sessions for the materials must show, that there were no proper materials to be found in or upon the wastes or common grounds near the highway, for the surveyors are not warranted to dig in the private soil for *all* the species of materials, because *some* of these species are not to be found in or upon the said wastes or common grounds: and it ought to specify what cannot be found in or upon the wastes or common grounds, and what may be found in the private soil; and they must previously know that it is to be found there, or at least have a reasonable prospect of finding it there, for they cannot dig to *try* for it in the private soil. (*R. v. Manning*, 1 *Burr.* 377.) However, in the 5 & 6 Will. 4, c. 50, s. 54, *supra*, power is given to *search* for and dig. Still it seems there ought to be a reasonable prospect for finding before a licence to *search* for and dig is granted.

That an order of sessions, to dig generally over all the estate of A. B., is bad; for the order must fix upon a particular part, and not leave it to the discretion of the surveyor. (*Id.*)

That satisfaction must be awarded to the owner, or to the occupier, or to both, according to the damages sustained by the one, or by the other, or by both. (*Id.*)

That notice to the occupier is sufficient, and it is sufficient to state that it was left at his place of abode. But the statute then directed the notice to be given to the owner or occupier. The words of the present statute are different.

By 5 & 6 Will. 4, c. 50, s. 55, If any surveyor or person employed by him shall, by reason of the searching for, digging, or getting any materials for repairing any highways, make any pit or hole in lands, common grounds, rivers, or brooks as aforesaid wherein such materials shall be found, he shall forthwith cause the same to be sufficiently fenced off, and such fence supported and repaired during such time as the said pit or hole shall continue open, and within 3 days after such pit or hole shall be opened or made, where no materials shall be found, cause the same to be forthwith filled up, levelled, and covered with the turf or clod which was dug out of the same, and where any such materials shall be found, within 14 days after having dug up sufficient materials in such pit or hole, cause the same to be filled up or sloped down, and fenced off, if required by the owner of the land or ground, and so continued; and every surveyor shall within 21 days after he shall have been appointed to that office cause all the said pits and holes which shall then be open and not likely to be further useful to be

7. *Materials for repairs.*

5 & 6 Will. 4, c. 50.

Decisions upon
29 Geo. 2, c. 67,
(now repealed).

Pits or holes in
getting materials
to be filled up or
sloped down, and
fenced off by
surveyor;

and so as to all
those already
made.

8. *Of surveyors.*

5 & 6 Will. 4, c. 50.

Penalties on surveyor for neglect herein.

filled up or sloped down in manner aforesaid, and if they are likely to be further useful he shall secure the same by posts and rails or other fences to prevent accidents to persons or cattle; and in case such surveyor or person shall neglect to fill up, slope down, or fence off such pit or hole in manner and within the time aforesaid, he shall forfeit the sum of 10s. for every such default; and in case such surveyor or person shall neglect to fence off such pit or hole, or to slope down the same, as hereinbefore directed, for the space of 6 days after he shall have received notice for either of those purposes from any justice of the peace, or from the owner or occupier of such several ground, river, or brook, or any person having right of common within such common or waste lands as aforesaid, and such neglect and notice shall be proved upon oath before the justices at a special sessions for the highways, such surveyor, person, or persons, shall forfeit and pay any sum not exceeding 10*l.* for such neglect, to be determined and adjudged by such justices, and to be laid out and applied in the fencing off, filling up, or sloping down such pit or hole, and toward the repair of the roads in the parish where the offence shall be committed, in such manner as the said justices shall direct and appoint; which forfeiture, in case the same be not forthwith paid, shall be levied as other forfeitures are hereinafter directed to be levied. (See ss. 101, 103, *post*, p. 1088.)

Penalty on surveyor allowing any heap of stone, &c., to remain on highway at night.

Sect. 56. If any surveyor or district surveyor shall lay or cause to be laid any heap of stone, or any other matter or thing whatsoever, upon any highway, and allow the same to remain there at night, to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same, shall forfeit for every such offence any sum not exceeding 5*l.*

Surveyor damaging mills, dams, &c., by digging materials, to forfeit not exceeding 5*l.*

Sect. 57. If any surveyor shall dig or cause to be dug materials for the highways, whereby any bridge, mill, building, dam, highway, occupation-road, ford, mines, or tin works, or other work, may be damaged or endangered, he shall forfeit for every such offence, on conviction, any sum not exceeding 5*l.*, at the discretion of the justices before whom the complaint thereof shall be made, notwithstanding his liability to any civil action to which he may make himself liable by such act.

Division of subject.

VIII. *Of Surveyors.*

Under this division will be noticed the enactments of the 5 & 6 Will. 4, c. 50, with respect to the appointment of surveyors,—their qualifications,—exemption from office and deputy,—the penalty for not acting,—powers of deputy, their salary,—their duty to name a successor, &c.,—and general penalty on, for neglect of duty. The different special duties of surveyors will be found in the subsequent sections of this title.

1. APPOINTMENT OF SURVEYOR.

Surveyor to be elected annually.

By 5 & 6 Will. 4, c. 50, s. 6, the inhabitants of every parish maintaining its own highways, at their first meeting in vestry (*a*) for the nomination of overseers of the poor in every year, shall proceed to the

(*a*) The vestry must be one whereof due notice has been given pursuant to 53 Geo. 3, c. 69, s. 1, and 1 Vict. c. 45. (*Reg. v. Best*, 5 Dowl. & L. 40.) A poll must be allowed if duly demanded at the election of a surveyor,

and if refused, a mandamus will be granted. (*Ex parte Grossmith*, 10 L. J. Q. B. 359; *Reg. v. D'Oyly*, 12 A. & E. 139; *Reg. v. St. Pancras*, 11 A. & E. 15.)

election of one or more persons to serve the office of surveyor in the said parish for the year then next ensuing (a): Provided always, that any outgoing surveyor shall continue to act until his successor shall be appointed, and shall be re-eligible, and may be re-elected, and shall in such case continue to act and remain in office, any thing herein contained to the contrary notwithstanding; and in such case notice of such election shall be given by the chairman to the person elected (b), and to the outgoing surveyor: Provided always, that in any parish where there is no meeting in the year for the nomination of overseers of the poor, the inhabitants contributing to the highway rate shall meet at their usual place of public meeting upon the 25th day of March, or if that should happen to be a Sunday or Good Friday, then on the day next following, or within 14 days next after the said 25th day of March in every year, to elect one or more persons to serve the office of surveyor for the said parish; which surveyor shall repair and keep in repair the several highways in the said parish for which he is appointed, and which are now or hereafter may become liable to be repaired by the said parish.

8. *Of surveyors.*
5 & 6 Will. 4, c. 50.
May be re-elected.

Where there is no meeting for the nomination of the overseers of the poor.

An inhabitant has the right to vote for the election of surveyor though not actually rated if he have property within the parish or township liable to be rated to the highway rate. (*Reg. v. Kershaw*, 26 L. J. M. C. 19.)

An objection to the appointment of three surveyors, not for the whole parish, but each of them for a particular division, was overruled where it appeared that such a mode of appointment had prevailed for several years. (*R. v. Baldwin*, 7 T. R. 169.) And where there were two townships, each of which was immemorially bound to repair the roads within it, and had originally had surveyors appointed for each, but from time to time, to avoid expense, there had been one appointment of two surveyors for the parish at large, one of them always being an inhabitant of one of the townships, and the other an inhabitant of the other, each surveyor acting in his own township; it was held, an appointment of surveyors for each township was proper. (*R. v. King's Newton*, 1 B. & Adol. 826.)

When may be appointed for different divisions of parish.

If more than one person be elected to the office of surveyor, they do not constitute but one officer; but each of them so appointed is a surveyor. (*Morrell v. Martin*, 8 Scott, 688.) Therefore, a demand of a highway rate by one of two surveyors, acting under the above act, is a valid demand. (*Id.*)

Where several appointed each of them surveyor.

The appointment must be stamped; for every appointment in writing to any office or employment, where the salary shall not amount to 50*l.* per annum, requires a stamp of 2*l.*, and, where a larger salary, then a larger stamp accordingly. (*R. v. Lew*, 8 B. & C. 655, which was the case of an assistant overseer.)

Appointment must be stamped.

The appointment of surveyor cannot, it seems, be removed into the court of Queen's Bench, because the *certiorari* is taken away; but an appeal lies against it (*post*, p. 1090); and every parishioner is a

Certiorari, appeal against.

(a) See the 54 Geo. 3, c. 91, tit. "Poor," by which overseers are to be appointed in every year on the 25th of March, or in fourteen days afterwards. In places where there is no annual meeting of the inhabitants for the nomination of overseers, notice of the intended meeting of inhabitants contributing to the highway rate should, nevertheless, be given under the provisions of 58 Geo. 3, c. 69; and, although it is not so expressed

in the clause, it will of course be proper that, in this latter case, notice should be given to the incoming surveyor, in like manner as in parishes which elect overseers. And it may be added, that it is not a ground for setting aside this appointment, that no churchwarden, tithing-man, headborough, or constable has been present at the meeting. (*R. v. Pettibard*, 4 Burr. 2452.)

(b) See form of notice, *post*, No. 1.

8. *Of surveyors.* person aggrieved by the appointment. (*R. v. Justices of St. Alban's*, 3 B. & C. 698; *Faucett v. Foulis*, 7 B. & C. 394.)
 5 & 6 Will. 4, c. 50.
 Evidence of old appointment.

On the trial of an indictment for the non-repair of highways, entries in an ancient parish book, produced by the churchwarden from the parish chest, were offered in evidence, to show who were the surveyors of the highways in 1707; it was held, that the evidence was receivable. (*R. v. Inhabs. of Pembridge*, 1 C. & M. 157.)

2. QUALIFICATION OF SURVEYOR. EXEMPTION FROM OFFICE. DEPUTY.

Qualification of surveyor.

By s. 7, any person living within the parish or any adjoining parish, and having an estate in houses, lands, tenements, or hereditaments lying within such parish, in his own right or in right of his wife, of the value of 10*l.* by the year, or a personal estate of the value of 100*l.* (such person not living within the parish being willing to serve the office), or being an occupier or tenant of houses, lands, tenements, or hereditaments (whether resident within the parish or within any adjoining parish) of the yearly value of 20*l.*, shall be eligible to be elected a surveyor for the purposes of this act: Provided nevertheless, that no person who is now exempted by law from serving the office of overseer of the poor shall be compellable to serve the office of surveyor (a): Provided also, that any person who may be chosen and elected to serve the said office of surveyor may provide a sufficient deputy, such deputy to be approved of by the justices (b) at a special sessions for the highways, who shall by writing under their hands testify their consent thereto. See *post*, p. 1106, as to surveyors appointed under a highway board, pursuant to 25 & 26 Vict. c. 61, and p. 1014, as to appointment of district surveyor.

Exemption.

Deputy.

3. PENALTY ON SURVEYOR NOT ACTING WHEN CHOSEN, OR NOT APPOINTING DEPUTY—POWERS, &c., OF DEPUTY.

Penalty on surveyor not acting when chosen, or providing a sufficient deputy.

By s. 8, if any person who shall be so chosen and elected, and who is not exempt as aforesaid from serving the said office, shall refuse or neglect to take upon himself the office of surveyor, or to provide a sufficient deputy, to be approved of as aforesaid, he shall forfeit, on conviction before any two justices, any sum not exceeding 20*l.*, unless he can show to the said justices good and sufficient cause why he should not be called upon to serve the said office: Provided also, that every deputy so provided and approved of shall have the same powers and authorities, and be subject to the discharge of the same duty, and be liable to the same penalties as any surveyor appointed under the authority of this act.

Powers, duties, &c. of deputy.

4. A SALARY MAY BE GIVEN.

Surveyor may be appointed with a salary.

By s. 9, instead of electing such surveyor as hereinbefore mentioned, it shall be lawful for the majority of the inhabitants so assembled as aforesaid in any parish for the election of surveyors as aforesaid to nominate and elect any one (see *Morrell v. Martin*, 8 Scott, 709, n. (185)) person of skill and experience to serve the said office of surveyor of such parish, and to fix such salary for the execution of such office as they shall think fit; which said appointment shall be in writing on paper without stamp, and signed by the chairman of such meeting(c); and such surveyor, when so appointed, shall be invested with the same powers, and subject to the same duties, forfeitures, and penalties, as

(a) As to who are exempted from serving the office of overseer, see 1 W. & M. c. 18, s. 11; 53 Geo. 3, c. 160; 6 & 7 Will. 3, c. 4; 59 Geo. 3, c. 12, s. 6; 12 & 13 Vict. c. 103, s. 6; *post*, "Pook."

(b) The old proviso, exonerating persons who have served for a year from further service during three years, is now omitted.

(c) See form, *post*, No. 2.

any surveyor appointed under the authority of this act would have been; and such salary shall be paid out of the money raised under the authority of this act, at such times and in such manner as shall have been agreed upon between the inhabitants so assembled as aforesaid and the person so nominated and elected as aforesaid: Provided, that if such surveyor shall cease to act, and be dismissed in the manner hereinafter described, such salary shall also in like manner cease and determine (a).

8. Of surveyors.

5 & 6 Will. 4, c. 50.
Salary, how raised.
Dismissal of.

5. SURVEYOR TO NAME HIS SUCCESSOR.

By s. 10, the surveyor or surveyors, at the time of passing his or their accounts as herein mentioned, [ss. 44, 45, *post*, p. 1019], shall deliver to the justices a statement in writing of the name and residence of the person appointed to succeed him or them as surveyor or surveyors (a).

Surveyor, on verifying his accounts, to name his successor.

6. APPOINTMENT OF SURVEYOR BY JUSTICES.

By s. 11, in case it shall appear on oath to the justices at a special sessions for the highways that the inhabitants of any parish have neglected or refused to nominate and elect a surveyor or surveyors in manner and for the purposes aforesaid, or that the outgoing surveyor, except he had been directed by the inhabitants so to do, has delivered no statement of the name and residence of his or their successor or successors, or that the surveyor is dead, or has ceased to possess the qualification (*ante*, p. 1012), or is or has become disqualified in any manner herein mentioned, or that he has neglected to act, or refused to carry into operation the duties imposed upon him by this act, it shall and may be lawful for such justices, and they are hereby authorised and required, by writing under their hands (b), at the next succeeding special sessions for the highways, to dismiss such surveyor so neglecting to act or refusing to carry into operation the duties imposed upon him by this act, and to appoint any person whom they may think fit to be a surveyor for such parish till the annual meeting then next ensuing for the nomination of overseers or for the election of surveyors as aforesaid, and with or without such salary, as to the said justices shall seem fit and proper; and the said surveyor, when so appointed, shall be invested with the same powers, and be subject to the same duties, forfeitures, and penalties, as any surveyor elected by the inhabitants of any parish as aforesaid would have been.

Power to justices in certain cases to appoint a surveyor.

Powers, &c., of surveyor.

The surveyor must be elected at a vestry of which due notice has been given, in pursuance of 58 Geo. 3, c. 69, s. 1; (*R. v. Best*, 5 D. & L. 48;) and if the justices appoint under the 5 & 6 Will. 4, c. 50, s. 11, it must not be at the same sessions at which the neglect or the refusal of the inhabitants is made to appear. (*Ib.*)

Election of surveyor.

Sect. 12. When a parish is situated in more than one county, division, or liberty, the surveyor so to be appointed as last aforesaid shall be appointed by the justices at a special sessions for the highways assembled in that county, division, or liberty in which the church of the said parish shall be situate.

When parish is situate in more than one county

It may perhaps be considered that the above two clauses are only directory to the magistrates to make the appointment at the time mentioned, there being no negative words to prevent them from exercising their office in that respect at any subsequent time, if it shall be necessary; common sense requiring, that if the appointment

(a) These two sections are not to apply to any parish within a highway district formed under 25 & 26 Vict. c. 61, *see* ss. 10 & 42 of 25 & 26 Vict. c. 61.

(b) *See R. v. Inhabitants of Pembridge*, 1 C. & M. 157. *See* form of appointment, *post*, No. 3. It must be stamped, *ante*, p. 1011.

9. *Of district surveyors, &c.*

5 & 6 Will. 4, c. 50.

Evidence of old appointment.

be not made at the first special sessions, it should be made afterwards. (*R. v. Denbighshire*, 4 East, 142. See *R. v. Leicester (Justices)*; 7 B. & C. 6; *R. v. Mayor of Norwich*, 1 B. & Ad. 310; *R. v. Sparrow*, 2 Stra. 1123.)

A minute-book, kept by the magistrate's clerk, was offered in evidence to show who had been appointed by the magistrates to be surveyors of the highways for the year 1812; it was held, that this evidence was not receivable without proof of a search for the original appointment, under the hands and seals of the magistrates. Whether the minute-book would have been receivable as secondary evidence, if the original appointments had been lost, is questionable. (*R. v. Pembridge*, 1 C. & M. 157.)

7. PENALTY ON SURVEYOR, &C., FOR NEGLIGENCE OF DUTY WHERE NO OTHER PARTICULAR PENALTY IMPOSED.

Penalty on surveyor, &c., for neglect of duty.

By s. 20, if any surveyor or district surveyor or assistant surveyor shall neglect his duty in anything required of him by this act, for which no particular penalty is imposed, he shall forfeit for every such offence any sum not exceeding 5*l.* (See *Morgan v. Leach*, 10 M. & W. 558 (a).)

A surveyor is liable, by subsequent sections of the act, to a penalty for not keeping account-books, and allowing inspection thereof, p. 1017; for non-delivery of books to his successor in office, p. 1017; for sharing in any contract, letting to hire any team, or disposing of materials without license from justices, p. 1005; for neglecting to fill up pits made for getting materials, p. 1009; for allowing any heap of stone, &c., to remain on highway at night, p. 1010; for damaging mills, dams, &c., by digging materials, p. 1010.

And see "*Highways, Turnpikes*," as to levying upon surveyor's goods the portion of the highway-rate directed to be paid towards the repair of a turnpike-road, in case of his refusal or neglect to pay the same.

Indictment against.

If the surveyor be guilty of any embezzlement or breach of duty, he may be indicted at common law. (*R. v. Anderson*, M.S., tit. "*Officer*.")

A surveyor is not liable in an action for damages, consequent upon an accident caused by the non-repair of a highway. (*Young v. Davis and Another*, 7 H. & N. 760; 2 H. & C. 197 Ex. Ch.) Under s. 109 of the 4 & 5 Will. 4, c. 50, he is entitled to notice of action for injuries sustained by a person driving over an obstruction caused by the surveyor whilst acting in execution of his office. (*Hardwick v. Moss*, 31 L. J. Ex. 205.)

IX. Of District Surveyors, and Formation of Parishes into Districts.

And herein of the mode of proceeding to form parishes into a district,—appointment of district surveyor—the record and duration of the union,—the powers and salary of the district surveyor,—the penalty on neglect of duty,—and of appointment of surveyors to make rate.

1. MODE OF PROCEEDING—APPOINTMENT OF DISTRICT SURVEYOR.

Parishes may direct application to be made to justices at sessions for forming them into districts.

By 5 & 6 Will. 4, c. 50, s. 13 (a), reciting, And whereas it is expedient that in many cases parishes should be formed into districts for the purpose of having one sufficient person to be the district surveyor, who should have the superintendence and management of the funds

(a) This section does not apply to a parish within a highway district

formed under 25 & 26 Vict. c. 61. See s. 42, *post*, p. 1017.

to be raised and levied under the provisions of this act in each parish forming part of such district; it is enacted, That it shall and may be lawful for the inhabitants of any parish in vestry assembled, if they shall think fit (a), to empower and direct one of the churchwardens of such parish, or the chairman of the said vestry, to make application (b) to the justices assembled at the quarter sessions for the county, or, where the parishes to be united shall be situated in the same division, at some special sessions for the division in which such parish shall be situate, for the purpose of being united with one or more parishes to form a district for the purposes aforesaid, and at the same time to nominate one fit and proper person to be returned to the said justices to be appointed as such district surveyor, together with the amount of the yearly salary which the said inhabitants in such vestry assembled shall agree to pay to such district surveyor; which application, with the name of such last-mentioned person, shall be forthwith made in writing, signed by the churchwardens of the said parish, or by the chairman of the said vestry as aforesaid, and forwarded to the clerk of the peace in and for the said county, or to the clerk of the justices in and for the said division, as the case may be, who shall lay the same before the justices at the quarter sessions then next holden in and for the said county, or at the special sessions as aforesaid (c).

9. *Of district surveyors, &c.*

5 & 6 Will. 4, c. 50.

Sect. 14. On such application as aforesaid being made by two or more parishes to the said justices, they are hereby authorised at the said quarter sessions, or at some special sessions as aforesaid, to take the same into their consideration, and to unite such and so many of the parishes so applying as aforesaid, as they shall think fit, into a district or districts for the purposes of this act; and the said justices shall select and appoint out of the persons so nominated as aforesaid by the several parishes so united into one district one fit and competent person to be the surveyor for such district, composed as aforesaid, which appointment shall be in writing (d).

Justices at sessions may unite such parishes into districts, and select and appoint a district surveyor.

2. RECORD AND DURATION OF UNION.

By s. 15, the names of the said parishes so united, and the name of the person so appointed as district surveyor, shall be reduced into writing signed by the chairman of the said quarter sessions, or by the majority of the magistrates present at such special sessions, and shall be transmitted by him or them to the clerk of the peace, who shall lay the same before the justices assembled at the quarter sessions in and for the said county, or at some adjournment thereof, who are hereby authorised and required to cause the same to be enrolled with the records of the court; and a copy thereof shall be sent by such clerk of the peace to each of the churchwardens or the surveyor of each of the said parishes so united; and such parishes so united shall continue to form a district for the purposes of this act for the space of three years then next following, and from thenceforward until the churchwarden of any one of the said parishes so united, or the chairman of the vestry, shall, by direction and in pursuance of a resolution of the inhabitants in vestry assembled, give twelve months' notice to the churchwardens and surveyor of each of the other parishes, and to the said district surveyor appointed by the said justices, and to the clerk of the peace of the county in which the said parishes are situate, of the

Names of parishes and of district surveyor to be recorded, and a copy thereof sent to each churchwarden, &c.

Parishes when united to form a district for three years, and until twelve months after any one parish shall give notice of intention to cease to form one of said district.

(a) This, it will be seen, does not render it compulsory on the parishes.

vestry in local boards.

(b) See form of application, *post*, No. 14.

(d) This and the three following sections do not apply to any parish in a district under 25 & 26 Vict. c. 61. See s. 42, *post*, p. 1017.

(c) See the 24 & 25 Vict. c. 61, s. 10, vesting powers of inhabitants in

10. *Of surveyor's accounts, &c.* intention of the said parish to cease to form a part of the said district; in which case, from and after the expiration of the said twelve months' notice, the union of the said parishes into such district as aforesaid, and the appointment of the said district surveyor shall cease and determine, so far as may concern or be binding on the said parish so giving such notice as aforesaid.

5 & 6 Will. 4, c. 50.

3. POWERS AND SALARY OF DISTRICT SURVEYOR.

District surveyor to have power, &c., of surveyor, except in levying rate.

By s. 16, such district surveyor, when so appointed, shall, for all the purposes of this act, except the making, assessing, and levying the rate in and by this act authorised to be made, assessed and levied (see s. 17, *inf.* s. 27, p. 1022), have, as far as the same are applicable, the same powers, and be subject and liable to the same duties, penalties, and forfeitures, as any surveyor elected under the provisions of this act is invested with and liable to, and shall have the laying out and application of all the funds raised and levied under the authority of this act: Provided nevertheless, that such district surveyor shall not expend any monies levied in any one of the said united parishes except for the use and benefit of the parish in which it is so levied, unless with the consent of the inhabitants of such parish in vestry assembled, for the purpose of carrying on repairs or beneficial improvements under the provisions of this act, for the common benefit of the said united parishes; and such district surveyor shall annually receive from each of the parishes composing his district respectively such salary as shall have been agreed upon by the several parishes in manner aforesaid, which salary shall be paid to such district surveyor by the surveyor of the highways out of the money raised in each of such parishes under the authority of this act; and in case of non-payment thereof, the same shall be recoverable from the surveyors of the highways of such parishes, to and for his own use, in the same manner as any forfeiture is recoverable under this act (a).

Salary of district surveyor how to be paid.

Penalty on district surveyor for neglect of duty.

4. PENALTY ON DISTRICT SURVEYOR FOR NEGLECT OF DUTY, &c.

See the 20th sect., *ante*, p. 1014.

5. SURVEYORS TO BE APPOINTED TO MAKE RATE.

When parishes are united, a surveyor to be appointed to make rate, &c.

By s. 17, in each of the parishes so united into a district as aforesaid, a surveyor shall be elected as herein mentioned, in addition to the district surveyor so appointed as aforesaid: Provided nevertheless, that such surveyor shall only be authorised and required to make, assess, and levy the rate herein directed to be made, assessed, and levied, (s. 27, &c., p. 1022), and from time to time pay over the money arising therefrom to such district surveyor.

X. Of the Surveyor's Accounts, Inspection of, and Enforcing Payment, &c., of.

Separate accounts to be kept (c).

By 5 & 6 Will. 4, c. 50, s. 39 (b), the surveyor in every parish shall keep separate and distinct accounts of the monies levied for the high-

(a) As to the mode of recovering penalties, see ss. 101, 103.

(b) A. and B., being co-surveyors of the highways of a parish, it was agreed between them that A. should deliver up the rate-book to B., and that B. should pay A. out of the monies he should collect under the rate, the sum of 15*l.*, which A. had advanced beyond the amount collected by the previous rate. The book was

accordingly delivered to B., who collected more than 15*l.*, but expended the whole in the repair of the roads, and did not pay A. the 15*l.*:—Held, that A. might maintain an action to recover it. (*Liddard v. Holmes*, 2 C. M. & R. 586.)

(c) Sections 39, 40, 43, 44, and 45 do not apply to districts under the control of highway boards created by 25 & 26 Vict. c. 61.

way rate; and such accounts shall specify the different sums, and the times when and the persons to whom and by whom the same shall have been collected and paid.

Sect. 40. The said surveyor, district surveyor, or assistant surveyor, as the case may be, shall and he is hereby required from time to time to keep a book, in which shall be entered a just and true and particular account of all money which shall have come to his hands as surveyor, district surveyor, or assistant surveyor of the parish for the purposes of this act, and to whom, and on what occasion, and for what work, and in what place, and on what day he shall have paid or applied the same, and also an account of all tools, materials, implements, and other things provided by him for the repair of the said highways; and such book shall at all reasonable times be open to the inspection of every inhabitant rated to the highway rate of the parish, or of any of the parishes united into a district, without fee or reward, and every such inhabitant may take copies or extracts from the said book, or any part thereof, without paying for the same; and in case the said surveyor, district surveyor, or assistant surveyor shall neglect to provide such book, or to enter therein every sum received or paid by him within one week after the same shall have been received or paid, or shall refuse to permit or shall not permit any such inhabitant as aforesaid at any reasonable time to inspect the same, or take copies or extracts as aforesaid, such surveyor, district surveyor, or assistant surveyor shall forfeit and pay any sum not exceeding 5*l.* for each default, to be levied and applied in manner herein provided. (See *post*, p. 1088.)

Sect. 41. All the said books, papers, writings, and accounts, and all materials, tools, and implements which shall be provided in pursuance of this act for repairing or preserving the highways, and also the scrapings of the said highways, shall be vested in the surveyor for the time being; or in case a district surveyor shall be appointed, then all such books, papers, writings, and accounts, and all materials, tools, implements, and scrapings, shall be invested in the district surveyor. (See *post*, p. 1086.)

See *post*, pp. 1018 and 1086, as to the custody of the books.

Sect. 42. The said surveyor, district surveyor, or assistant surveyor shall, within 14 days after leaving his office, deliver such books and accounts verified as herein directed (*b*), together with all such sums of money as shall be due from him, and likewise all tools, materials, implements, and other things as aforesaid, to his successor in office, or retain the same in his hands, and account for them in his next account if he shall be continued surveyor or district surveyor of such parish in the succeeding year; and in case such surveyor or district surveyor shall neglect to deliver within such time as aforesaid, the said books, papers, writings, and accounts, and such tools, materials, implements, and other things, in manner aforesaid, he shall for every such offence forfeit any sum not exceeding 5*l.*; and in case he shall make default in the paying or accounting for the money so due from him within the time and according to the directions aforesaid, he shall forfeit double the money so due.

Under the statute 13 Geo. 3, c. 78, s. 48, it was held that a surveyor of highways could not maintain an action against the late surveyor for the balance remaining in his hands until his accounts had been settled, and allowed or disallowed in the manner pointed out by the 48th section of that act, which provided that the surveyor, before he went out of office, should do certain things as to his accounts; and whenever the said accounts should be settled in manner therein appointed, the surveyor should forthwith deliver a duplicate of the account, with all such sums of money as should remain in his hands, to the succeeding surveyor. (*Heudebourck v. Langton*, 10 B. & C. 546.)

10. Of surveyor's accounts, &c.

5 & 6 Will. 4, c. 50.

Surveyor to keep books and account of monies received, &c.(a);

to be open to inspection of rated inhabitants.

The property in books, materials, &c. to be vested in surveyor for time being.

Surveyor, on quitting office, to deliver books, &c., to succeeding surveyor.

Penalty for neglect.

Decisions under the 13 Geo. 3, c. 78.

(a) See *ante*, note (*b*), p. 1016.

(b) That is by s. 45, *post*, p. 1019.

10. *Of surveyor's accounts, &c.*

5 & 6 Will. 4, c. 0.

Under this enactment it was also held, that churchwardens and overseers have not such a property in the account-books of a late surveyor of the highways as to enable them to maintain trover for them; and that their remedy was under this enactment. (*Addison v. Round*, 7 C. & P. 285.)

Where a late surveyor of highways, on his account books being demanded of him at the vestry, said, "I have not got them, I have delivered them to my brother J.," who in his presence, said, "I have them, and I will keep them." J. was one of the overseers of the poor of the parish: it was held, under the same enactment, in an action of trover against A., that this was no evidence of a conversion by A., as the overseer is a person to whom the books are to be delivered under the enactment, and the judge would not leave it to the jury to say whether this delivery over was colourable. (*Id.*)

If a surveyor improperly neglected to account, as directed by the 13 Geo. 3, c. 78, he might have been compelled to do so by mandamus. (*R. v. Lewis*, 1 Dowl. 531.)

In a case also decided under the 48th section of that statute, where a mandamus suggested that defendant was surveyor of the highways for a time named and now expired; and that divers books of accounts, &c. relating to the highways, during his time of office, were now in his possession, and ought to be delivered to the churchwardens, and that he had often been required so to deliver them, and had refused; and the mandamus commanded him to deliver to the churchwardens all books, &c. in his possession, or show cause to the contrary; and the defendant returned, that he had not, on the day of the teste of the mandamus, nor since, nor now, nor when he was required on behalf of the churchwardens, any books, &c., in his possession; not stating whether he had them in his possession between the times of the requisition and the teste, nor what he had done with them, the return was held good; but the court refused to give the defendant the costs he had incurred by reason of the mandamus. (*R. v. Round*, 4 Ad. & E. 139.)

Surveyor guilty of embezzlement may be indicted.

In case of death of surveyor, executors to account.

If a surveyor be guilty of any embezzlement or breach of duty, he may be indicted. (*R. v. Anderson*, MS., post, "Officer.")

Action against executor (a).

Sect. 43. In case of the death of any such surveyor, district surveyor, or assistant surveyor, before he shall have paid and fully satisfied all the monies which he shall have received by virtue of this act, then and in every such case the executors or administrators of such surveyor, district surveyor, or assistant surveyor so dying, shall pay and satisfy the same out of his estate and effects unto the succeeding surveyor, district surveyor, or assistant surveyor, in like manner as other debts are directed by law to be discharged by such executors or administrators, and also shall deliver up all books, papers, writings, assessments, tools, materials, and implements, and other things concerning his office, which shall have come to the hands of such executors or administrators, who shall and may plead such payment in any action or suit which may be brought against them on account of the said estate and effects, and give the same in evidence; and in case of the non-payment of such monies, or the non-delivery of such books, papers, writings, assessments, tools, materials, implements, and things, for the space of one calendar month after demand made thereof in writing by or on behalf of the said succeeding surveyor, it shall be lawful for the said succeeding surveyor to commence and prosecute an action or actions in any of his Majesty's courts of record at Westminster against such executors or administrators for the recovery of the said monies, or for the recovery of damages for the detention of such books, papers, writings, assessments, tools, materials, implements, and things, in which action or actions full costs of suit shall be recovered by the said succeeding surveyor.

(a) By the 13 Geo. 3, c. 78, s. 48, the executor or administrator was liable to a penalty for making default.

Sect. 44. Within 14 days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all monies received and disbursed by virtue of this act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appointment of surveyor as herein directed the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways holden at the place nearest to the parish or district for which such surveyor shall have been appointed, and such justices are hereby authorised and required to examine him as to the truth of the said accounts or of any charge contained therein: Provided always that if any person chargeable to the rate authorised to be made by this act has any complaint (a) against such accounts or the application of the monies received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid, and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet (b).

10. Of surveyor's accounts, &c.

5 & 6 Will. 4, c. 50.

Yearly accounts to be made by surveyors, &c., and laid before the justices at a special sessions for highways.

Complaint may be made against such accounts.

There is no appeal to the quarter sessions against the allowance at special sessions of the accounts of the surveyor. (*Reg. v. West Riding of Yorkshire (Justices)* 1 Q. B. 624.) In this case the justices in petty sessions had allowed accounts which were complained of, but, as they themselves deposed, had not entered fully into the case, under the impression that an appeal lay to the quarter sessions, and that the case involved important questions of law, and the court of Queen's Bench, after deciding that no such appeal lay, refused a mandamus to the petty sessions to review the allowance.

No appeal to quarter sessions against allowance of accounts.

Nor is there any appeal on the part of the surveyor against an order of justices allowing a part of his accounts and disallowing the remainder, and directing him to pay the amount disallowed to his successor. (*Reg. v. J. P. of Leicestershire*, 8 E. & B. 557.)

Sect. 45. It shall and may be lawful for the justices of the peace within their respective divisions, or any two or more of them, and they are hereby required, to hold not less than 8 nor more than 12 special sessions in every year for executing the purposes of this act, the days of the holding thereof to be appointed at a special sessions to be held within 14 days after the 20th day of March in every year: Provided always, that it shall not be necessary to cause any notice to be given or sent to any justice acting and residing within such limits of the day or time of the holding thereof; [*post*, p. 1043]; and at the said special sessions held next after the 25th day of March in every year, [s. 44, *supra*], the surveyor of each of the parishes within their respective divisions shall verify his accounts, and shall make a return in writing to such special sessions of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and watercourses appertaining thereto, and of all nuisances and encroachments, if any, made

Justices to hold special sessions for purposes of this act.

At such sessions surveyor to verify accounts, and make return of state of roads, &c.

(a) Such a complaint is within the words of the 20 & 21 Vict. c. 43, s. 2, enabling justices to reserve a case for the opinion of the superior courts. (*Townsend v. Reid*, 30 L. J. M. C. 223.)

(b) There is a proviso at the end of

this section as to surveyors appointed under 13 Geo. 3, passing their accounts. This penalty does not apply to assistant surveyors appointed under s. 18. (*Adams v. Lakeman*, E. B. & E. 615.)

10. *Of surveyor's accounts, &c.*
5 & 6 Will. 4, c. 50.
12 & 13 Vict. c. 35.

upon the several highways within the parish for which he was surveyor, as well as the extent of the different highways which the said parish is liable to repair, what part thereof has been repaired, and with what materials, at what expense, and what was the amount levied during the time he was surveyor of the said parish.

The 12 & 13 Vict. c. 35 (Highways Act), s. 1, recites 5 & 6 Will. 4, c. 50, ss. 44, 45, and enacts that at the special sessions in each division at which the accounts of any surveyors, district surveyors and assistant surveyors shall be produced and verified as by the said recited act required, the clerk to the justices shall prepare from such accounts a separate statement in writing, according to the form in the schedule to this act, of the receipts and expenditure on account of the highways of each parish in such division, and shall, within 14 days after such special sessions, transmit all such statements to one of her Majesty's principal secretaries of state; and for the preparation and transmission of each such statement such clerk shall be entitled to charge to the respective parish the fee of 2s.; and if any such clerk to such justices shall neglect to transmit any such statement within the time hereinbefore prescribed for that purpose, he shall for every such offence, on conviction, forfeit any sum not exceeding 5*l.*, nor less than 40*s.*, and such penalty shall be recovered and applied as penalties are by the said act made recoverable and applicable.

Penalty on neglect.

Town clerks of cities and boroughs, and clerks to trustees and commissioners, to prepare statements of accounts respecting highways, and transmit them to secretary of state.

Sect. 2. That the town clerk of every city, borough, port, cinque port or town corporate subject to the provisions of the act "for the Regulation of Municipal Corporations in England and Wales," and the clerk to the trustees or commissioners appointed under any act of parliament where the council of such city, borough, port, cinque port or town corporate, or such trustees or commissioners, are authorised to pave, cleanse, or repair any highway, shall, within 30 days next after every annual or other periodical account of the receipts and expenditure of such council, trustees, or commissioners, in respect of the highways under their management has been made out, or where provision is made for the settlement or audit of such account, then within 30 days after such settlement or audit, prepare from such account a statement in writing, showing (as far as circumstances will permit) the like particulars of such receipts and expenditure respectively in the form contained in the schedule to this act, and shall, within the time aforesaid, transmit such statement to one of her Majesty's principal secretaries of state; and if such town clerk or clerk to the trustees or commissioners shall neglect to transmit any such statement within such time as aforesaid, he shall for every such offence, on conviction, forfeit any sum not exceeding 10*l.* nor less than 5*l.*, and such penalty shall be recovered and applied as penalties are by the said act made recoverable and applicable.

Penalty on neglect.

Abstracts of statements to be laid before parliament.

Sect. 3. That such secretary of state shall every year cause the statements transmitted to him under this act to be abstracted, and the abstracts thereof to be laid before both houses of parliament.

SCHEDULE.

General Statement of the Receipts and Expenditure on account of the Highways of the parish [township, hamlet, &c.] of in the county of for the year ending 25th of March, 18 , as appearing from the accounts of surveyor of highways for the said parish [township, hamlet, &c.], allowed by the justices at a special sessions for the highways, holden at on the day of .

	RECEIPTS.	£	s.	d.
Balance in hand (if any) from last account				
Rates or assessments received in money				
Value of team labour performed by ratepayers in lieu of rates				
Value of other work performed by ratepayers in lieu of rates				

	£	s.	d.	11. Of the highway rates.
Receipts from turnpike trusts (if any)				
Other receipts				
Total income	£			12 & 13 Vict. c. 35.

EXPENDITURE.

	£	s.	d.
Balance overpaid (if any) on last account			
Paid for manual labour			
„ for team labour (in money)			
„ for materials			
„ for tradesmen's bills			
„ for salaries			
Value of team labour performed by ratepayers in lieu of rates			
Value of other work performed by ratepayers in lieu of rates			
Payments to turnpike trusts (if any)			
Other payments			
Total expenditure	£		

Leaving on the 25th March, 18 , a balance of £
in hand, or overspent, as the case may be.

Signed

Clerk to the justices for the division.

Dated 18 .

The accounts must be exhibited in such a manner as will enable the justices to exercise their judgment upon them; the assessments, therefore, ought to be produced. Where the surveyor has improperly allowed the time for producing and passing his account to go by, a writ of mandamus will lie to compel him to produce them. (*Rex v. Round*, 4 A. & E. 139; *R. v. N. R. Yorkshire*, 6 B. & C. 152.) As to the jurisdiction respecting the surveyor's accounts under the repealed act, 13 Geo. 3, c. 78, ss. 48, 80, see *R. v. W. R. Yorkshire*, 5 T. R. 629; *R. v. Mitchell*, Id. 701; *R. v. Somersetshire*, 5 B. & C. 816; *R. v. N. R. Yorkshire*, 6 B. & C. 152; *R. v. Fowler*, 1 Ad. & Ell. 836; *R. v. Justices of Cumberland*; 1 Har. & Woll. 497; *R. v. Goodenough*, 2 Ad. & E. 463.

By the 5 & 6 Will. 4, c. 50, s. 111, *post*, p. 1095, surveyors may charge in their accounts the expenses of legal proceedings.

5 & 6 Will. 4, c. 50. Accounts, how to be produced.

Surveyors may charge for legal proceedings.

XI. Of the Highway Rates.

An important change in the former law, as regards the funds for paying the expenses of repairing, &c., highways, is effected by the 5 & 6 Will. 4, c. 50. This statute, by repealing the 13 Geo. 3, c. 78, 34 Geo. 3, c. 74, and 54 Geo. 3, c. 109, has abolished the former obligation of statute duty, and the means pointed out by those acts for obtaining funds for the repair, &c., of highways, in the shape of composition in lieu of such statute duty.

By the present statute the funds for the repair of highways are to be raised by highway rates, upon nearly the same principle as the poor-rates, and to be levied and collected by the surveyor, &c., under the provisions of that statute, and which we shall now notice in the following order.

Herein of—

1. *How the Rate is to be assessed*, p. 1022.
2. *Poor rate Assessments may be inspected by Surveyor*, p. 1023.
3. *The Form and Amount of the Rate*, p. 1024.

Division of subject.

Statute duty, and composition in lieu of, abolished.

11. *Of the highway rates.*

5 & 6 Will. 4, c. 50.

4. *Powers in Local Acts of Compounding for Rates extended to Surveyor*, p. 1024.
5. *Errors in Rates may be corrected*, p. 1024.
6. *Poor Persons may be discharged from Rate*, 1025.
7. *Persons exempt from former Statute Duty not liable to Rate*, p. 1025.
8. *Mode of proceeding for the Recovery of Rates*, p. 1025.
9. *Rate-payers enabled to divide Carriage of Materials*, p. 1026.

1. HOW RATE TO BE ASSESSED, &c.

Surveyor to make rate.

By 5 & 6 Will. 4, c. 50, s. 27, in order to raise money for carrying the several purposes of this act into execution (a), it is further enacted, that a rate shall be made, assessed, and levied by the surveyor (b) upon all property now liable to be rated and assessed to the relief of the poor; provided (c) that the same rate shall also extend to

How to be made.

(a) By the 82nd sect., *post*, p. 1030, where it shall not appear that there is sufficient money in the hands of the surveyor for making satisfaction to the owner of lands taken for widening highways, two justices, where the owners agree, and the court of quarter sessions, where the recompense is settled by a jury, are authorised to direct the surveyor to make and levy a rate for raising the money required for such recompense. By the 91st sect. *post*, p. 1041, this power is extended to raising the money wanted for the purchase of land required for a new highway. And see *post*, p. 1208, as to the justices at special sessions for the highways, on proof of the deficiency of the funds, &c., of any turnpike trust ordering payment to such trust of a portion of the highway rate; and 30 & 31 Vict. c. 121, s. 3, *post*, p. 1177, as to payment of balances by trustees to parishes in which turnpike road becoming a highway is situated.

(b) See 5 & 6 Will. 4, c. 50, s. 17, *ante*, p. 1016, as to a surveyor being appointed to make rate when parish formed into a district.

(c) This proviso is not limited to the identical mines before actually rated, but extends to mines of the same class and description as those usually rated in the parish before the act passed, though worked for the first time after the passing of the act. (*Reg. v. Saunders*, 24 L. J. M. C. 57.)

The meaning of the words "usually rated," in s. 27, is such woods, &c., as in point of fact were usually rated in the particular parish at the time of the passing of the statute. (*R. v. Rose*, 6 Q. B. 153.) If the rates are co-existent, the court will

not presume that they are made for the same period of time, and therefore invalid. (*Ib.*) By a local act for the improvement of a particular portion of a parish it was provided that every inhabitant or owner who should be assessed for the rates made under that act for any lands or tenements within the limits of the act should be released and free from all rates and assessments towards the paving and lighting any other street, road or place within the parish, in respect of such lands and tenements. Held, that this did not exempt an occupier of premises assessed within the local district from being assessed in a general highway rate imposed upon the whole parish, although a portion of such rate might be expended in paving parts of the parish out of the district. (*Richardson v. Tubbs*, 4 C. B. 4.)

By 13 & 14 Vict. c. 99, provision is made to enable vestries to determine whether tenements not exceeding 10l. yearly value shall be liable to the poor rate and to the highway rates, and the mode of assessment is regulated. This statute will be found under title "*Poor Rate*," and also the 12 & 13 Vict. c. 14, which enables overseers to recover the costs of distraining for poor rates or highway rates. If a party claims an exemption from a highway rate, he must appeal, and if he omits to do so no objection can be raised by him to a rule under 11 & 12 Vict. c. 44, s. 5, calling upon the justices to issue a distress warrant against his goods for the amount of the rate. (*R. v. Oxfordshire (Justices of)*, 18 L. J. M. C. 222; *Birmingham (Churchwardens of) v. Shaw*, 10 Q. B. 868.) As to the application of rates to turnpike roads, see *infra*, p. 1208.

such woods, mines, and quarries of stone, or other hereditaments, as have heretofore been usually rated to the highways; and provided also, that every such rate shall be signed by the said surveyor, and allowed by two justices of the peace, and published in the same way as poor rates are now allowed and published.

11. *Of the highway rates.*

5 & 6 Will. 4, c. 50.

In the case of *Js. of Staffordshire*, 23 L. J. M. C. 17, the court held that an allowance written by the justices in the middle of the rate instead of at the end of it, in the words "We do hereby consent to and allow the foregoing rate and assessment," was no allowance of the part of the rate which followed the signature.

See title "*Local Government*" for the cases relating to the repairs of highways and the levying of rates for that purpose by local boards of health within districts under their management.

The liability to be rated to the poor is grounded on the statute 43 Eliz. c. 2, s. 1, by which the overseers of the poor to raise the sums of money necessary for the relief of the poor, and other purposes therein mentioned, by taxation "of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwoods in the parish. This liability will be found fully noticed under title "*Poor*."

Principle and proportion of the rate, &c.

In making the highway rate under this act, the surveyor should, under the powers given in the next section, make the same with reference to property included in the last rate made for the relief of the poor, though if he should discover other property which is rateable, he should insert that also.

The words "usually rated" in this section refer not to legal rateability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the county generally, and therefore it is right to enquire whether in every particular case the words mines, &c. were in fact rated at the time of the passing of the act. (*Reg. v. Rose*, 6 Q. B. 153.) But this proviso is not limited to the identical mines woods, &c. before actually rated, it extends to others of the same class and description as those actually rated, though worked for the first time since the Highway Act coming into operation. (*Reg. v. Randall*, 24 L. J. Q. B. 57.)

As to the allowance of the rate, see the 43 Eliz. c. 2, s. 1, and 17 Geo. 2, c. 3, s. 1; and the observations and decisions fully noticed under title "*Poor*."

Allowance of rate.

2. POOR RATE ASSESSMENTS MAY BE INSPECTED BY SURVEYOR.

By 5 & 6 Will. 4, c. 50, s. 28, in order to enable the surveyor to form a proper judgment of any rate to be made in pursuance of this act, it is further enacted that it shall be lawful for the surveyor, and he is hereby authorised and empowered, at all reasonable times, to inspect, or by writing signed by him to grant authority to any person appointed by him to inspect, any of the rates made towards the relief of the poor of the parish of which he is surveyor, or the books wherein the assessments thereto shall be entered, without fee or reward; and the surveyor, or person by him authorised as aforesaid, shall be allowed to make a copy of such rate or books, or to take any extracts therefrom; and if any person in whose custody or power any of the said rates or books shall be, shall, when thereunto required in manner aforesaid, refuse or neglect to produce the same to the surveyor, or person so by him authorised as aforesaid, as the case may be, or to allow such copy or extract to be made or taken, at all reasonable hours in the day-time, he shall for every such offence forfeit and pay any sum not exceeding 5*l*.

Surveyor may inspect rate-book, and obtain copies or extracts.

Penalty if books are not produced.

In *Spenceley v. Robinson* (3 B. & C. 658,) it was decided on the construction of the 17 Geo. 2, c. 3, s. 2, that there must be a demand to inspect a poor rate at a reasonable time and place. And in *Bennett v. Edwards*, (7 B. & C. 586,) an assistant overseer appointed under 59

Demand of inspection.

11. *Of the highway rates.* Geo. 3, c. 12, was held not liable to the penalty for not producing the rate upon demand for inspection, unless it appear that by the terms of his appointment, it was part of his duty to produce the same: but if the defendant neglect, after notice, to produce his appointment on the trial, it may be inferred that it was his duty to produce the rate on demand.

5 & 6 Will. 4, c. 50.

3. FORM AND AMOUNT OF RATE.

Form and amount of rate.

By 5 & 6 Will. 4, c. 50, s. 29, every rate shall contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and shall also specify the sum in the pound at which it is made (*a*); and no rate to be levied or assessed as aforesaid shall exceed at any one time the sum of 10*d.* in the pound, or the sum of 2*s.* 6*d.* in the pound in the whole in any one year (*b*): Provided nevertheless, that with the consent of four-fifths of the inhabitants of any parish contributing to the highway rate assembled at a meeting specially called for that purpose, 10 days' previous notice of the same having been given by the surveyor of the said parish, the rate to be levied and assessed as aforesaid may be increased to such sum as the said inhabitants so assembled may think proper.

4. POWERS IN LOCAL ACTS OF COMPOUNDING FOR RATES EXTENDED TO SURVEYOR.

Surveyor to have power to enforce composition in certain parishes.

By 5 & 6 Will. 4, c. 50, s. 30, in parishes in which the overseers of the poor have power by local acts of Parliament to compound with or require composition for poor rates from the landlords of certain houses, tenements, or hereditaments, and in case of their refusal to compound, to rate such landlords as the occupiers, the surveyor shall have the same powers, remedies, and privileges to compound and enforce composition, and, in case of refusal by the landlords, to assess them in the same proportions to the rates authorised to be made by this act, as the overseers of the poor have by such acts for assessing and recovering any rate made for the relief of the poor, or the compositions entered into for the same.

5. ERRORS IN RATES MAY BE CORRECTED.

Errors in rates may be rectified.

By 5 & 6 Will. 4, c. 50, s. 31, Whenever it shall appear to the said surveyor as aforesaid that there has been any omission or error in any rate or assessment made in pursuance of this act of or in the name or any person, parson, or vicar, or of any house, shop, warehouse, coach-house, stable, cellar, vault, building, workshop, manufactory, garden-ground, land, tenement, wood, tithe, mines, pits or quarries of any mineral, stone, or other matter whatsoever, or hereditaments liable to be rated for the purposes of this act, it shall be lawful for the said surveyor as aforesaid, with the consent and approbation of the justices at a special sessions (*post*, p. 1043) for the highways, to cause to be added or corrected in the said rate or assessment the name of the person, parson, or vicar omitted or erroneously stated,

(*a*) See form of rate, *post*, No. 17.

(*b*) In pleading a surveyor's assessment made on occupiers of lands, under the repealed stat. 13 Geo. 3, c. 78, ss. 30 and 45, it was necessary to aver that the assessment did not exceed 9*d.* in the pound on the yearly value of the lands; although the limitation as to value annexed to ss. 30 and 40 is contained in a distinct proviso; and although the form of an order of

justices, in schedule No. 15, of the act, adapted to the above sections, makes no mention of yearly value. (*Morell v. Harvey*, 4 A. & E. 684.) Concurrent rates cannot be made for the same period of time. (*Reg. v. Fordham*, 11 A. & E. 73.) But another rate may legally be made when a former one has not been wholly collected. (*Reg. v. Best*, 5 Dowl. & L. 40.)

and a description of the property in respect of which he ought to be rated; and every such addition or correction made in any of the said rates, and signed by such justices, shall be as valid and effectual as if the same had been part of the original rate at the time when it was first made.

11. *Of the highway rates.*

5 & 6 Will. 4, c. 50.

As to rates not being quashed, &c., for want of form, see sect. 107 (*post*).

See, as to a poor rate being altered after it has been allowed, *R. v. Barrat*, 2 Dougl. 465; *post*, tit. "Poor."

6. POOR PERSONS MAY BE DISCHARGED FROM RATE.

By 5 & 6 Will. 4, c. 50, s. 32, It shall and may be lawful for the justices at a special sessions for the highways, on application made to them by any person rated to any rate under the authority of this act to be discharged therefrom, on proof of his inability through poverty to pay such rate, the surveyor having been first summoned to appear on the part of the parish, to order and direct that such person shall be excused from the payment of such rate; and which order of the said justices is hereby declared to be final with respect to such rate. See form of summons, *post*.

Persons may be excused by justices from payment of highway rate.

When the occupier is discharged from payment of highway rate on account of poverty, the owner of the premises is not liable to be rated. (*Reg. v. Hull Dock Coy.* 2 B. & C. 516.) Since the passing of the Small Tenements Act (13 & 14 Vict. c. 99), owners of tenements not exceeding the yearly value of 6*l.* may be rated to the highway rate instead of the occupier. See "POOR."

7. PERSONS EXEMPT FROM FORMER STATUTE DUTY, NOT LIABLE TO RATE.

By 5 & 6 Will. 4, c. 50, s. 33, When property, or the owner or occupier in respect thereof, has, previous to the passing of this act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners and occupiers thereof shall be exempt from the payment of the rate hereby imposed.

Certain persons not liable to payment of highway rate.

There does not appear to have been any express exemption in the acts by which the statute duty, composition, and highway rate had been regulated. (See *ante*, p. 1021.) A particular township, however, or particular persons, might be exempted by act of Parliament. (*R. v. Lacey*, 5 B. & C. 702; *R. v. Dayrell*, 1 B. & C. 685), or perhaps by prescription (*Fawcett v. Fowles*, 7 B. & C. 394; and see *Chatfield v. Ruston*, 3 B. & C. 863; *Mitchell v. Fordham*, 6 B. & C. 274; *R. v. Toms*, Dougl. 401); and many exemptions are to be found in local acts in favour of particular kinds of property. (See *Holford v. Copeland*, 3 B. & P. 129; *R. v. Manchester Waterworks Company*, 1 B. & C. 630; *R. v. Mosley*, 2 B. & C. 226, &c.)

The proper mode of trying the validity of an exemption from the rate is not by a rule under 11 & 12 Vict. c. 44, s. 5 (*Reg. v. Shropshire*, 3 N. Sess. Cases, 641), but by appeal to the sessions (*Mersey Docks Co. v. Jones*, 30 L. J. M. C. 185.)

8. MODE OF PROCEEDING FOR THE RECOVERY OF RATES.

By 5 & 6 Will. 4, c. 50, s. 34, For levying and recovering the said rate by this act authorised to be made, the surveyor shall have the same powers, remedies, and privileges as the overseers of the poor in the parish have by law for the recovery of any rate made for the relief of the poor (a).

Rates how to be recovered.

(a) The 12 Vict. c. 14, enables surveyors of highways to recover the

costs of distraining for rates. See the act under "Poor."

11. *Of the highway rates.*

5 & 6 Will. 4, c. 50.

As to the mode of proceeding for the recovery of a rate made for the relief of the poor, see tit. "*Poor*." See also the forms of proceedings under that title.

No appeal lies under the 20 & 21 Vict. c. 43, against the decision of justices refusing to enforce payment of highway rates pursuant to 5 & 6 Will. 4, c. 50. (*Walker v. G. W. R. Coy.*, 29 L. J. M. C. 117.) The right course is to obtain a rule against the justices, pursuant to 11 & 12 Vict. c. 44, s. 5.

The rate may be demanded by one of two surveyors acting under the 5 & 6 Will. 4, c. 50. (*Morrell v. Martin*, 8 Scott 688.) And it may be paid to one of such surveyors. (*Ib.*)

Under the repealed statute 13 Geo. 3, c. 78, it was held that no action could be maintained by the surveyors of highways against the parties rated for non-payment of the sums assessed, in lieu of statute duty; a specific remedy, by distress, having been given by the statute. (*Underhill v. Ellicombe, M'Cl. & Y.* 450.)

An action lies against the surveyor for executing a warrant of distress for non-payment of highway rates if the party distrained upon proves his exemption. (*Freeman v. Read*, 32 L. J. M. C. 226.)

See forms of summons for non-payment of assessment, No. 19, and warrant of distress for non-payment of, No. 20 (a).

9. RATE PAYERS ENABLED TO DIVIDE CARRIAGE OF MATERIALS.

By 5 & 6 Will. 4, c. 50, s. 35, it shall be lawful for two rate payers of any parish, within 6 days next after the annual appointment of the surveyor, by a notice in writing, to require the said surveyor to call a meeting of the rate payers of the said parish for the purpose hereafter mentioned, and the said surveyor shall call such meeting within 8 days after the receipt of such notice, and shall give 6 days previous intimation of such meeting; and if at such meeting a majority of the rate payers then and there assembled shall signify their consent thereto, it shall and may be lawful for the rate payers keeping a team or teams of two or more horses or beasts of draught to divide among themselves, in proportion to the amount of rate to which they may respectively be assessed, the carrying of the material which may be required by the said surveyor for the repairs of the highways within such parish, and that they shall be paid by the said surveyor for such carrying of task-work, within 1 calendar month after having performed such service, after such rate per cubic yard of material per mile, and so in proportion for any less distance than a mile, as shall be fixed by the justices, at their first meeting in special sessions for the highways after the 25th day of March in every year (c), which rate the said justices are hereby required to fix at such special sessions [as to

Ratepayers may divide among themselves the conveyance of stone, &c., for repair of highways (b),

which shall be paid for by surveyor.

(a) See *R. v. Græme*, 2 A. & E. 615; *R. v. Mirehouse*, 2 A. & E. 632—in which cases the court refused to compel magistrates by writ of mandamus to issue warrants for parish highway rates made under 13 Geo. 3, c. 78, it being doubtful whether they might not be liable to actions if they did so: and see *R. v. Somersetshire (Justices)*, 4 Nev. & M. 394, where the court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed, under the above statute, upon land which had never been rated before, and the liability of which to be

rated was denied; and, the prosecutor having, previously to the motion for the rule for the mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without offering a sufficient indemnity, discharged the rule, with costs.

(b) This section is not to apply to any parish within any highway district formed under 25 & 26 Vict. c. 61, ss. 40 and 42.

(c) See sect. 45. This provision as to time is discretionary only. (*Rex v. Justices of Leicestershire*, 7 B. & C. 6.)

such sessions, see sect. 45, *post*, p. 1043]: Provided always, that such carrying or task-work shall be performed at such times and places and in such manner as the said surveyor may direct (the periods of spring, seed-time, and harvest always excepted); and that in case the said surveyor shall not approve of the manner in which such carrying or task-work shall be performed, it shall be lawful for the justices at a special sessions for the highways to hear the complaint of such surveyor in that respect, and to award such pecuniary redress or forfeiture against the party offending as to them shall appear reasonable.

The object of this section is to secure to the farmers the team-work which may be necessary for the repair of the roads within their respective parishes. (*Shelford Highway Act, Report on County Rates, ordered by the House of Commons to be printed, 31st July, 1834, p. 5.*)

12. *Of the collector, &c.*

5 & 6 Will. 4, c. 50.

At what time carrying to be performed.

Mode of proceeding where improperly done.

Object of enactment.

XII. Of the Collector of Highway Rates, and his Accounts.

By the 5 & 6 Will. 4, c. 50, s. 36, the surveyor of any parish, the consent of the majority of the inhabitants in vestry assembled, being first had and obtained, may from time to time appoint any number of collectors of the said rates, and may remove any such collector and appoint another in his stead, and make such allowance as to such collector, out of the monies to be received under this act, as the said inhabitants in vestry assembled shall think reasonable (s. 18, *ante*, p. 1002), and the said collector is hereby declared to have all the same powers, remedies, and privileges for the levying and enforcing the payment of such rates as the surveyor nominated or appointed under the authority of this act. (See *ante*, s. 34, p. 1025.)

Surveyor, with consent of vestry, may appoint collector of rates.

Formerly the surveyor was the sole collector of highway rates, but now he is empowered, with the consent of the inhabitants in vestry, to appoint a collector, to remove him, and to pay him; and the collector is invested with the same powers for levying the rate as the surveyor.

By s. 37, it shall be lawful for the said surveyor and he is hereby required to take security from every collector appointed by virtue of this act, for the due execution of his office of collector, which security shall be to the full amount of the sum likely to be in the hands of the said collector at any one time, and shall be by bond without stamp. (See *Form, post*.)

Security to be taken from collector.

Perhaps this clause may be deemed to be directory only, so that the appointment of a collector may be complete, although the security required has not been given. (*R. v. Patteson, 4 B. & Ad. 9.*)

By s. 38, every collector appointed by virtue of this act shall under his hand, and at such time and in such manner as the surveyor may direct, deliver to the said surveyor as aforesaid true and perfect accounts in writing of all monies which shall have been by such collector received by virtue of this act, and also a list of the names of all such persons as shall have neglected or refused to pay their respective rates, and of the monies due from them respectively; and that every such collector shall pay all such monies as shall remain due from him to the said surveyor as aforesaid; and if any such collector shall refuse or neglect to make and render such account, or to produce and deliver up the list of persons neglecting and refusing to pay their rates as aforesaid, or to make payments as aforesaid, or shall refuse or wilfully neglect to deliver to the said surveyor as aforesaid, or to such person as he shall appoint to receive the same, within 3 days after being thereunto required by the said surveyor as aforesaid by notice in writing under his hand given to or left at the usual place of abode of such collector all books, papers, and writings in his custody or power

Collector to make out accounts of all monies received.

Of list of defaulters.

To pay over monies received. Proceedings in default, &c.

13. *Of the widening, &c., of.*

5 & 6 Will. 4, c. 50.

relating to the execution of this act, or to give satisfaction to the said surveyor as aforesaid respecting the same, then and in every such case, upon complaint made by the said surveyor as aforesaid of any such refusal or wilful neglect as aforesaid to any justice of the peace, such justice may and he is hereby authorised and required to issue a summons under his hand for the collector so refusing or neglecting to appear before any two justices of the peace; and upon the said collector appearing, or having been so summoned and not appearing without some sufficient or reasonable excuse, or not being found, it shall be lawful for the said two justices to hear and determine the matter; and if, upon confession of the party, or by the testimony of any credible witness on oath, it shall appear to such justices that any monies remain due from such collector, such justices may and they are hereby authorised and required, upon nonpayment thereof, by warrant under their hands, to cause such money to be levied by distress and sale of the goods and chattels of such collector; and if no goods and chattels of such collector shall be found sufficient to answer and satisfy the said money, and the charges of distraining and selling the said goods and chattels, then and in every such case such justices shall and they are hereby required to commit such offender to the common gaol or house of correction for the county, city, or place where such offender shall be or reside, there to be kept to hard labour for a period not exceeding 6 calendar months, or until he shall have paid such monies as aforesaid, or compounded with the surveyor as aforesaid for such money (which composition the said surveyor, with the consent of the inhabitants in vestry, or, in any parish where they do not meet in vestry, with the consent of the inhabitants contributing to the highway rate at a public meeting assembled, is hereby empowered to make and receive), or if it shall appear to such justices that such collector had refused or wilfully neglected to render and give such accounts, or to produce and deliver the list of persons neglecting and refusing to pay their rates as aforesaid, or that any books, papers, or writings, relating to the execution of this act remained in the hands or in the custody or power of such collector, and he refused or wilfully neglected to deliver or give satisfaction respecting the same as aforesaid, then and in every such case such collector shall, on conviction thereof, forfeit for such offence any sum not exceeding 20*l.*, and in default of payment thereof shall be committed to the common gaol or house of correction for the county, city, or place where such offender shall be or reside, there to be kept to hard labour for a period not exceeding 4 calendar months, or until he shall have given a true and perfect account as aforesaid, and delivered such list as aforesaid, and delivered up such books, papers, and writings, or give satisfaction in respect thereof to the said surveyor; Provided always, that no conviction or imprisonment of such collector as aforesaid shall exonerate or discharge any security taken from him on his appointment as aforesaid.

Conviction of collector not to discharge security.

XIII. Of the Widening, Changing, and Stopping up Highways.

We shall proceed first to take a preliminary view of the common law on this subject, and then point out the alteration and improvement it has undergone by statutory enactments.

By common law.
By a writ of *ad quod damnum*.

By the Common Law.—By the common law an ancient highway cannot be changed, without the king's license first obtained upon a writ of *ad quod damnum* (a), and an inquisition thereon found, that such a

(a) The writ of *ad quod damnum* is returnable into Chancery, directed to the sheriff, to inquire by a jury whe-

change will not be prejudicial to the public: and it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seemeth that the king's subjects have not such an interest in such new way, as will make good a general justification of their going in it as a common highway, but that, in an action of trespass brought by the owner of the land against those who shall go over it, they ought to show specially, by way of excuse, how the old way was obstructed, and the new one set out; also it is said, that the inhabitants are not bound to keep watch in such a new way, or to make amends for a robbery therein committed, or to repair it. (1 *Haw. c. 76, s. 34.*)

13. *Of the widening, &c., of.*
At common law.

So, a public right of navigation in a river or creek cannot be extinguished except by an act of parliament, or writ of *ad quod damnum*, and inquisition thereon, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, &c., and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel, at the time when the road was made, cannot be proved; in favour of the existing state of things, it must be presumed, that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be moved as a nuisance to that navigation. (*R. v. Montague, 4 B. & C. 598; Vooght v. Winch, 2 B. & Ald. 662.*)

It seems that the finding of a jury, under a writ of *ad quod damnum*, in favour of the party at whose instance it is issued, is not a bar to an indictment for a nuisance, but that the jury by whom such an indictment is to be tried have a right to exercise their own judgment upon the matter, and may find that to be a public nuisance which another jury, under that writ, may have found not to be to the prejudice of his Majesty's subjects. (*R. v. Russell, 6 B. & C. 600.*)

On account of the expense and difficulty attending a writ of *ad quod damnum*, and the more compendious and easy method of diverting highways provided by the now repealed statutes 13 Geo. 3, c. 78, s. 19, and the 55 Geo. 3, c. 68, that writ has been seldom issued in modern times, and it may be questionable whether it is not virtually abolished by the 5 & 6 Will. c. 50, s. 85 (*post*, p. 1033).

A highway cannot be narrowed by the common law. (*Fowler v. Sanden, Cro. Jac. 446; and see R. v. Lord Grosvenor, 2 Stark. 511.*)

Where a new road is made in pursuance of such a writ, and inquisition thereupon found, after the person who sued out the writ hath once made the said road, the parishioners ought to keep it in repair for the future; because, being discharged from the repairing of the old road, no new burden is laid upon them, but their labour is only transferred from one place to another. (*Ex parte Vennor, 3 Atk. 771. See R. v. Flecknow, 1 Burr. 465, 523.*)

Repair of a road after.

But if the new road lie in another parish, then the person who sued out the writ, and his heirs, ought not only to make it, but to keep it in repair; otherwise the parishioners of such other parish would have a

ther such change will be detrimental to the public; which inquisition, being a proceeding only *ex parte*, is in its own nature traversable, and the party grieved may be heard against it before the Chancellor. By stat. 55 Geo. 3, c. 68, s. 3, (now repealed), jurisdiction was given to the justices in sessions to hear and determine appeals concerning the same. In *R.*

v. Justices of Essex, (1 B. & A. 373), it was decided, that, upon an appeal against the inclosure of a highway, by virtue of a writ of *ad quod damnum*, it was incumbent on the party to give the notices required by the 3rd section of the now repealed act 55 Geo. 3, c. 68; and that a notice to the party interested was not alone sufficient.

13. *Of the widening, &c., of* new charge upon them, and no recompense, by the former road being taken away. (*Ex parte Vennor*, 3 *Atk.* 772.)

Highways may be changed by act of God.

It is certain that a highway may be changed by the *act of God*; and therefore it hath been holden, that if a water, which has been an ancient highway, by degrees changes its course and goes over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (1 *Haw.* c. 76, s. 4. And see *Welb.* 375.)

Existence of right of way over road where one end stopped up.

It seems that a right of way over a road still exists, though one end of it be lawfully stopped up. (*R. v. Marquis of Downshire*, 4 *A. & E.* 713.)

By statute.

By Statute (a).—In aid of the common law, and to render the changing of highways less troublesome and expensive, power was given by stats. 13 Geo. 3, c. 78, and 55 Geo. 3, c. 68, to justices of the peace to widen, divert, change, and stop up highways, as they thought fit; those enactments are now repealed by the 5 & 6 Will. 4, c. 50, s. 1, and further provisions enacted in lieu of them, and which we shall here notice in the following order:—

I. WIDENING AND ENLARGING OF.

II. STOPPING UP, DIVERTING AND TURNING OF.

III. THE PROVISIONS AS TO WIDENING AND DIVERTING, &c., HIGHWAYS, EXTENDED TO HIGHWAYS, REPAIRABLE RATIONE TENURÆ.

I. WIDENING AND ENLARGING OF.

And herein, 1stly, of the order of justices for. Compensation to owners, &c. 2ndly, The costs of the proceedings, &c.

1. Order of Justices for. Compensation to owners, &c.

5 & 6 Will. 4, c. 50. Justices may order narrow highways to be widened (c).

By 5 & 6 Will. 4, c. 50, s. 82, where it shall appear, upon the view (b) of two justices of the peace, that any highway (s. 93, *post*, p. 1043), is not of sufficient breadth, and might be widened and enlarged, such justices shall, and they are hereby empowered, within their respective divisions, to order such highway respectively to be widened and enlarged in such manner as they shall think fit, so that the said highway, when widened and enlarged, shall not exceed 30 feet

(a) Roads are sometimes changed, &c., by turnpike acts, inclosure acts, and other acts of parliament. See tit. "*Commons*," as to stopping up and diverting highways under inclosure acts.

In the cases of *R. v. Tippet*, 1 *Russ. on Crimes*, last edit. 484, and *Reg. v. Scott*, 6 *Jur.* 1084, the defendants were convicted for obstructing a road when they had not fulfilled the conditions upon which statutory powers for diverting the road had been conferred upon them.

Justices in petty sessions made an order for stopping a highway under a local act giving an appeal; the time for appeal having elapsed, it was held, that it could not be con-

tended, on a prosecution for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty sessions. (*R. v. Marquis of Downshire*, 4 *Ad. & E.* 698; tit. "*Commons*."

(b) It seems that the justices should make this view together, (*post*, p. 1036.)

(c) It was held that the power of two justices, under the repealed stat. 13 Geo. 3, c. 78, s. 16, to order any highway to be widened, extend to roads repairable *ratione tenuræ*; and that upon disobedience to such an order, the party might either be proceeded against summarily under the statute, or by indictment. (*R. v. Balme*, *Cowp.* 648.)

in breadth (a); and that neither of the said powers do extend to pull down any house or building (a), or take away the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house, or any inclosed ground set apart for building ground or as a nursery for trees; and for the satisfaction of the person, body politic or corporate, who is seised or possessed of or interested in their own right, or in trust for any other person, (see *post*, p. 1043, s. 93), in the said ground that shall be laid into the said highway respectively so to be widened and enlarged, the said surveyor, under the direction and with the approbation of the said justices in writing, shall and is hereby empowered to make an agreement with him for the recompense to be made for such ground, and for the making such new ditches and fences as shall be necessary, according and in proportion to their several and respective interests therein, and also with any other person, body politic or corporate, that may be injured by the widening and enlarging such highway, for the satisfaction to be made to him respectively as aforesaid; and if the said surveyor, under the direction and with the approbation of the said justices, cannot agree with the said person, body politic or corporate, or if he cannot be found, or shall refuse to treat or take such recompense or satisfaction as shall be offered to them respectively by such surveyor, then the justices of the peace at any general quarter sessions to be holden for the limit wherein such ground shall lie, upon certificate in writing (c) signed by the justices making such view as aforesaid of their proceedings in the premises, and upon proof of 14 days' notice in writing having been given by the surveyor of such parish to the owner, occupier, or other person, body politic or corporate, interested in such ground, or to his guardian, trustee, clerk, or agent, signifying an intention to apply to such quarter sessions for the purpose of taking such ground, shall impanel a jury of 12 disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and the said jury shall, upon their oaths, to the best of their judgment, assess the damages to be given and recompense to be made to the owners and others interested as aforesaid in the said ground for their respective interests, as they shall think reasonable, not exceeding 40 years' purchase for the clear yearly value of the ground so laid out, and likewise such recompense as they shall think reasonable for the

13. *Of the widening, &c., of.*

5 & 6 Will. 4, c. 50.

Surveyor to agree with owners of lands for recompense, and, if they cannot agree, the same may be assessed by a jury at quarter sessions (b).

(a) Stopping up and diverting a highway, being an interference with the rights of the public, must be effected in strict accordance with the provisions of the statute. It seems that the limitation as to not pulling down any house, &c., contained in 5 & 6 Will. 4, c. 50, s. 82, does not apply to the case of diverting a highway, which must be done with the consent of the owner of the land through which the new road passes; but (assuming it to apply to such a case) where, at the instance of A., and with his consent, the quarter sessions duly made an order that an existing highway should be diverted, and a new highway substituted through the lands of A., which the surveyors were thereby authorised to purchase for that purpose, with a proviso that in so doing the surveyors were not to pull down any house, &c., and the surveyors made the new road, not

according to the plan deposited with the clerk of the peace, but as nearly on the site there delineated as was practicable, without pulling down a house, it was held, that the statutory power for diverting the old highway had not been properly carried out. It was also held, that the proviso rendered the order of sessions bad on its face, for throwing that upon the discretion of the surveyors, who are ministerially to execute, what is in truth a restraint upon the power of the magistrates, who are to order; and that if it were rejected, the new highway would not be made in pursuance of the order. (*R. v. Newmarket Railway Company*, 19 L. J. 241, M. C.)

(b) See *post*, "Highways, Turnpike," 3 Geo. 4, c. 126, ss. 84, 85, &c., and "*Mandamus*."

(c) See form of certificate, *post*, in *Forms*.

13. *Of the widening, &c., of.*

5 & 6 Will. 4, c. 50,

On payment of money assessed, ground to be deemed a public highway (a).

Saving to owner, mines, timber, &c.

Where not money sufficient, a further rate may be made, by order of justices at quarter sessions, not exceeding one-third of rate.

Cost of proceedings, by whom payable (c).

making of new ditches and fences on the side of the said highway that shall be so widened and enlarged, and also satisfaction to any person, body politic or corporate, that may be otherwise injured by the widening and enlarging the said highways respectively; and upon payment or tender of the money so to be awarded and assessed to the person, body politic or corporate, entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such person, body politic or corporate, cannot be found or shall refuse to accept the same, for the use of the owner of or others interested in the said ground, the interest of the said person, body politic or corporate, in the said ground shall be for ever divested out of them; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway to all intents and purposes whatsoever; saving nevertheless to the owner of such ground all mines, minerals, and fossils lying under the same, which can or may be got without breaking the surface of the said highway, and also all timber and wood growing upon such ground, to be felled and taken by such owner within one month after such order shall have been made, or in default thereof to be felled by the said surveyor within the respective months aforesaid, and laid upon the land adjoining, for the benefit of the said owner; and where there shall not appear sufficient money in the hands of the surveyor for the purpose aforesaid, then the said two justices in cases of agreement, or the said court of quarter sessions after such verdict as aforesaid, shall direct the surveyor to make, collect, and levy an equal rate in the same manner as the rate by this act authorised to be made, (see s. 27, *ante*, p. 1022,) and to pay the money to the person, body politic or corporate, so interested, in such manner as the said justices or court of quarter sessions respectively shall direct and appoint; and the money thereby raised shall be employed and accounted for, according to the order and direction of the said justices or court of quarter sessions respectively, for and towards the purchasing the land to widen and enlarge the said highway, and for making the said ditches and fences, and also satisfaction for the damages sustained thereby; provided that no such rate to be made in any one year shall exceed one-third part of the rate by this act authorised to be levied (b) in addition to the rate for the repair of the highways.

There is no appeal against this rate, when made at quarter sessions nor can it be removed by certiorari. But if made by two justices, an appeal lies to the sessions (s. 105); and if a case be granted (s. 108), the writ of certiorari lies, *post*, *Certiorari*. An appeal also lies against the order for widening.

2. *Costs of the Proceedings, &c.*

Sect. 83. In case such jury shall give in and deliver a verdict for more monies as a recompense for the right, interest, or property of any person, body politic or corporate, in such lands or grounds, or for the making such fence, or for such damage or injury to be sustained by him as aforesaid, than what shall have been proposed and offered by the said surveyor before such application to the said court of quarter sessions as aforesaid, that then and in such case the costs and expenses attending the said several proceedings shall be borne and paid by the surveyor out of the monies in his hands or to be assessed and levied by virtue and under the powers of this act; but if such jury shall give and deliver a verdict for no more or for less monies than shall have been so offered and proposed by the said surveyor before such application to

(a) See *post*, tit. "*Highways, Turnpike*," 3 Geo. 4, c. 126, s. 86.

(b) By the old law, the maximum

of the rate was 6d. in the pound.

(c) See *post*, "*Highways, Turnpike*," 3 Geo. 4, c. 126, s. 87.

the said court of quarter sessions, that then the said costs and expenses shall be borne and paid by the person, body politic or corporate, who shall have refused to accept the recompense and satisfaction so offered to him as aforesaid.

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5 & 6 Will. 4, c. 50.

II. STOPPING UP, DIVERTING, AND TURNING HIGHWAYS.

And herein of—1. The proceedings to obtain the justices' certificate for, and the certificate, &c.—2. The appeal against stopping up, &c. and costs on, &c.—3. The order for stopping, &c.—4. The repair of highways diverted, &c.

Division of subject.

1. *Proceedings to obtain Justices' Certificate and Certificate for, &c.*

By 5 & 6 Will. 4, c. 50, s. 84, when the inhabitants in (a) vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view (b) the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this act: Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this act, (*post*, *Penalties*); and the said surveyor is hereby required to make such application as aforesaid.

Vestry, if they think that way should be stopped up, &c., to direct surveyor to request justices to view the same.

Mode of proceeding if other party desirous of stopping up.

Expenses in such case.

As to stopping up footpaths across lands required for rifle volunteer and artillery volunteer practice, see 23 & 24 Vict. c. 140, s. 17, and 25 & 26 Vict. c. 41, s. 4.

The widening an existing highway is a diversion of an old and a substitution of a new highway within this section, for it makes no difference whether the new right of way is given over entirely new land, or whether the new land be bounded by an old narrow highway. *Per Blackburn J. in Reg. v. Phillips*, 1 L. R. Q. B. 660.

Sect. 85. When it shall appear upon such view (b) of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand (c), or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (d) to this act annexed, in legible characters, at the place and

If apparent to justices that way unnecessary, &c.,

and consent of owner of land obtained,

notices to be given,

(a) That is the inhabitants of the place or district in which the highway in question is situated. *Wright v. Frant (Overseers of)*, 32 L. J. M. C. 204.)

(b) It seems, that the justices must make a joint view. (*post*, p. 1036.)

(c) See form of consent. *post*, No. 24. See *R. v. Kirk*, 1 B. & C. 21;

R. v. Justices of Kent, (*Id.* 622), *post*, p. .)

(d) See form of notice, *post*, No. 25; *post*, *Forms*.) The notice ought to follow the form given in the schedule. In *Rex v. Horner*, 2 B. & Ad. 150, a notice was held bad which only described the road as lying between two *termini*, and stated as the object of the intended order that 426

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and upon proof thereof, and upon plan of old and new highway being left with justices,

the said justices to certify, &c.

Certificate, &c., to be lodged with clerk of the peace, &c.,

and read at quarter sessions,

and to be inrolled.

Inspection, &c., of certificate and plan.

by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned or stopped up, either entirely or subject as aforesaid, (as the case may be), shall lie, for 4 successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on 4 successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway, by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary; and the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions (a) which shall be holden for the limit within which the highway so diverted and turned or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of 4 weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid) be read by the said clerk of the peace in open court; and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be inrolled (b) by the clerk of the peace amongst the records of the said court of quarter sessions: Provided always, that any person whatever shall be at liberty, at any time previous to the said quarter sessions, to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace at the rate of 6d. *per folio*, and a reasonable compensation for the copy of the plan.

The certificate of justices, made pursuant to this section in the case of the diversion of an old road by the substitution of a new one, is sufficient if it declare that the old highway will become unnecessary when the proposed new highway is completed as proposed. (*Reg. v. Phillips*, 1 L. R. Q. B. 612.)

yards of the road, but not saying what part, would become unnecessary, and would be stopped up. So, in *Reg. v. Midgley*, 12 W. R. 954, a certificate of justices was held bad which certified "that a new footpath would be more commodious than the said highways and footpaths hereinbefore intended to be diverted when the diversion thereof has been made," because the act does not authorise the justices to certify with reference to a

future state of things.

(a) This means the quarter sessions for the county, riding, division, shire, &c., in which the highway in question is situated, and not any adjournment thereof held within a particular division of the county for the purpose of deciding matters in its vicinity. (*Reg. v. Justices of Lancashire*, 8 E. & B. 563.)

(b) See *De Ponthieu v. Pennyfeather*, 5 Taunt. 634.

Sect. 86. In any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate (a).

Sect. 87. In the event of any appeal (s. 88, *post*, p. 1038) being brought against the whole or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate without prejudice to the remaining part or parts thereof.

The certificate of justices is insufficient if it does not state upon the face of it that all the particulars required by s. 84 have been complied with. (*Reg. v. Justices of Worcestershire*, 23 L. J. M. C. 113.)

These enactments as regards the stopping up, diverting, and turning highways, in many respects materially differ from the prior provisions contained in the 13 Geo. 3, c. 78, ss. 19, 21, 22, and 55 Geo. 3, c. 68. It was not provided by those acts that the vestry should direct the surveyor to apply to justices to view the way, nor did they enable any other party desirous of stopping up, diverting, or turning a way, to require the surveyor to give notice to the churchwardens to call a vestry to consider the matter, as is now the case under the above 84th section of the new act.

Again, the introduction of the words "either entirely or reserving a bridleway or footway along the whole or any part or parts thereof," gets rid of the difficulty as to a *partial* diversion, suggested in *R. v. Winter*, 8 B. & C. 785.

Again, s. 84, the inhabitants are to exercise an absolute control over the extinguishment or alteration of their highways. For whether they themselves may be desirous of the change, or whether an individual may entertain such a wish, the surveyor or district surveyor is to be applied to for the purpose of requiring two justices to view the road in question with their sanction. That being done, and the expenses of the surveyor paid, it is imperative upon him to make the application, and equally imperative upon the magistrates to view.

The difficulty regarding the notice of holding special sessions, which formerly existed, is removed. (2 B. & Ad. 154.) The necessity also of having a plan annexed to the notice is done away with, for the justices are to have the plan subsequently to the notice.

The new enactments give no power of selling the old highway, when stopped up, as was the case under the repealed acts. Under the present law, therefore, perhaps the owner of the soil will become absolutely and exclusively entitled to it.

A public highway led over the land of H. J. A. He opened another road over his own land, between the same points which the public used, and they ceased using the former road. Nine years afterwards he obtained an order of justices for stopping up the old road as unnecessary, under the repealed act 55 Geo. 3, c. 68, s. 2: held, that such order might properly be made, and that it was not necessary to proceed as in case of diverting a highway under the also now repealed act, 13 Geo. 3, c. 78, s. 16. (*R. v. Justices of Cambridgeshire*, 4 Ad. & E. 111, *per Denman*, C. J., and *Patteson*, J.)

An order of justices for stopping an unnecessary highway, under the repealed act 55 Geo. 3, c. 68, was bad, if it stopped up half the breadth of a highway, leaving the rest open, although the other half was not within their division (*R. v. Inhabitants of Milverton*, 5 Ad. & E. 841);

13. Of the widening, &c., of.

5 & 6 Will. 4, c. 50. As to stopping up more than one highway connected together.

Court may confirm order for so doing wholly or in part.

Observations, &c., on enactments.

Difference between them and repealed enactments.

When proceedings may be taken to stop road and not necessary to proceed as in case of a diversion.

Stopping up half the breadth of highway.

(a) See *R. v. Kenyon*, 6 B. & C. 645.

13. *Of the widening, &c., of.*

and it seems doubtful whether the justices of the two divisions could by orders made concurrently, have stopped up both sides. (*Id.*) Under the present act (see s. 84, p. 1033), a highway may be stopped up, &c., either entirely or reserving a bridleway or footway along the whole or any part or parts thereof.

View by justices.

It was held, under the repealed act 55 Geo. 3, c. 68, that to ground an order for stopping up a highway the view by justices was not sufficient, unless it was a joint one, nor unless their finding was come to immediately upon it. (*R. v. Justices of Cambridgeshire*, 4 A. & E. 111; 5 N. & M. 140. See *R. v. Marquis of Downshire*, 4 A. & E. 713.) Under the present enactments it seems to be necessary that the view should be a joint one.

Consent of owner of land to new way passing through it (*ante*, p. 1033).

As regards the consent of the owner to the new way passing through his grounds, it has been held, that an order made by justices under the first part of sect. 2 of the now repealed act 55 Geo. 3, c. 68, for stopping up an old highway and setting out a new one, must be made, and show that it was made with the consent in writing, under the hand of the owner (at the time of the order) of the land through which the new highway is proposed to be made; and therefore, where an order made under that statute, recited that the justices had received evidence of the consent of J. T. Esq., "in his lifetime," to the new road being carried through his lands, by writing under his hand, and it appeared that another person was owner of the land at the time the order was made; it was held, that such order was insufficient, and could not be carried into execution. (*R. v. Kirk*, 1 B. & C. 21.) The court in the same case said, that their decision would not affect the question, whether an owner of an estate might revoke a consent given by a former owner who was alive and consenting at the time the order was made. So a consent to the diversion of a road, under the hand and seal of the solicitor and agent of the party through whose ground the new road was to pass, was held under the repealed acts insufficient. (*R. v. Justices of Kent*, 1 B. & C. 622.)

It is unnecessary to obtain or state the consent of trustees of a turnpike road over which the new path was turned, for they have no interest in the soil. (*Davison v. Gill*, 1 East, 69.)

Notices required by section 85.

If the justices having viewed the highway to be stopped up, diverted, or turned (according to the nature of the application), in their discretion (to be exercised in regard to the greater nearness or commodiousness of the way, or, on the other hand, of its inutility) think that it may be diverted, turned, or stopped up (according to the application), and in case the owner of the lands or grounds through which the new highway (if any) proposed to be made consents thereto by writing under his hand, the next step will be for the surveyor or district surveyor to give the notices required by s. 85. If the justices, on the contrary, think that the application ought to be refused, the matter must drop for the present.

The notice must be given by the surveyor or district surveyor, and the statute in this respect is imperative, not directory. (See *R. v. Justices of Suffolk*, 6 B. & C. 110; *R. v. Justices of Surrey*, 5 B. & C. 241.)

The 85th section points out the way these notices are to be given.

It would seem that the notices cannot be considered as published until they have been given in each of the three modes required by the act for 4 successive weeks, and that the power of the justices to certify will not arise until the expiration of that time. (See *R. v. Kent*, 1 B. & C. 622.)

Certificate of justices

After these notices have been given and the times limited thereby have elapsed, application should again be made to the two magistrates who have viewed the road, for their certificates. This application should be supported by proof of the publication of the notices, to be adduced by the affidavit of the person who put them up, and by the production of the newspaper in which they were inserted, and by the

production of a plan of the old and proposed new highways, by metes, bounds, and the admeasurement thereof, verified by some competent surveyor. These are to be adduced before and delivered to the justices, who are then to certify that they have viewed the proposed new highway: that it is nearer or more commodious (*post*, p. 1040) to the public—if nearer, the number of yards; if more commodious, the reasons why so. If a highway is stopped as unnecessary, the certificate must state the reason. (Sect. 85, *ante*, p. 1033.)

It seems that under the repealed statutes there must have been a separate order for stopping up each individual way, so that two or more ways could not be comprised in one order. (*R. v. Kenyon*, 6 B. & C. 645; *R. v. Inhabitants of Milverton*, 5 A. & E. 841.) But now, by the 86th section of the new act (see *ante*, p. 1035), different highways may, in certain cases, be included in one order or certificate.

The certificate of the viewing justices ought to state that the surveyor who makes the application to the justices was duly authorised to do so by the vestry, pursuant to s. 84. (*Reg. v. Justices of Worcestershire*, 3 E. & B. 477.)

In *R. v. Justices of Kent*, (10 B. & C. 477,) it was held, that an order made under the 55 Geo. 3, c. 68, s. 2, (now repealed) for diverting an old highway and substituting a new one, must have shown on the face of it that the justices viewed the line of the proposed new road. In *R. v. Justices of Worcester* (8 B. & C. 254), it was held to be necessary that an order made under the same enactment for stopping up an unnecessary highway should state that it appeared to the justices, *on view*, that the way was unnecessary, and therefore that an order merely stating that the "justices had, upon view, found," or "that it appeared to them" that the way was unnecessary, was bad.

An order of justices under the above enactment, 55 Geo. 3, c. 68, s. 2, for stopping up a highway, which stated, that "We, W. R. and G. Q., justices, &c., having viewed a certain public highway," &c. (describing it), "and it appearing unto us, the said justices, that such highway is unnecessary, do order," &c., was held insufficient, because the conclusion of the justices that the highway was unnecessary, did not appear on the face of the order to be derived exclusively from the view. (*Reg. v. Jones*, 12 A. & E. 684; *R. v. The Marquis of Downshire*, 4 A. & E. 698.)

In *R. v. Jones, Coleridge, J.*, stated, "It ought to appear unequivocally, and not only by probable argument, that the justices acted on their own view, and derived their conviction from that. There is no part of the administration of the law by justices, acting on their own authority, in which it is more necessary for the court to look closely at their proceedings than the stopping of highways."

But where an order made under the above enactment began, "We," &c., "having, upon view, found, and it appearing to us," that a certain highway is unnecessary, it was held, that this recital did not imply that the justices acted under any other information than their own view, and that the order was good. (*R. v. Milverton*, 5 A. & E. 841.) In *R. v. Jones, supra*, Lord Denman said, "In *Rex v. Milverton*, the words 'having, upon view, found,' were equivalent to a recital that it appeared upon the view of the justices."

In such an order the following recital:—"We, A., B., and C., justices," &c., "assembled at a special sessions, held" &c., on &c., "having upon view found that a certain part of a highway called &c., is unnecessary;" was held sufficiently to show that the justices viewed such highway together, and at the time when the order was made. (*Rex v. Cambridgeshire Justices*, 4 A. & E. 111.)

Where a road had been disused for many years, by reason of a new one having been made; it was held, under the repealed act 55 Geo. 3, c. 68, that the justices might properly state in their order that they had viewed the old road, if they had viewed the ground over which the right of way was. (*R. v. Justices of Cambridgeshire*, 4 A. & E. 111.)

13. *Of the widening, &c., of.*

13. *Of the widening, &c., of.*

Proof of non-user of a road for 28 years by carts and carriages, and the stopping up of such road by a gate kept always locked, is presumptive evidence that the road had been stopped up under an inclosure award with the consent and by order of 2 justices. (*Williams v. Eytton*, 4 H. & N. 357.)

As to an order for stopping up a highway, &c., under the above repealed act being explained by a plan annexed to it, see *R. v. Horner*, 2 B. & Ad. 150.

to be lodged with the clerk of the peace,

The certificate, and the proof and plan, as soon as conveniently may be after the making of the certificate, are to be lodged with the clerk of the peace, and read in open court at the quarter sessions to be held next after the expiration of 4 weeks from the day the certificate was lodged, and to be inrolled. (Sect. 85, p. 1033.)

and to be inrolled.
Appeal.

Parties thinking themselves aggrieved by the proposed alteration may appeal; but the questions whether the proposed new highway is nearer and more commodious (*post*, p. 1039) to the public, or whether, when stopped, it is unnecessary, or whether the party appealing would be injured or aggrieved, are to be determined by a jury. (5 & 6 Will. 4, c. 50, s. 88, *infra*.)

But if there be no appeal, or, being one, it is dismissed, the order for stopping up or diverting is to be made by the court of quarter sessions, under sect. 91 (*post*, p. 1041), instead of 2 justices, as heretofore.

Justices must not contravene provisions of local act.

Care should be taken by the justices in their proceedings under these enactments that they do not contravene the provisions of any local act, (which are excepted). Where the exceptive words of a local act were as follows:—"Unless leading over some moor or waste ground, or to some village, town, or place to which such new road doth not lead," the court held the exception absolute. Therefore where trustees had assigned a road to the plaintiff, but it appeared that there was no other way to the defendant's house, although the plaintiff had left a sufficient space, he was nonsuited in an action of trespass, because the whole road remained subject to the servitude it was before liable to, the trustees being incompetent to effect a partial destruction of it. (*Wilkinson v. Bagshaw*, Peak, Add. Ca. 165.)

2. *Appeal against stopping up, &c. Costs on, &c.*

5 & 6 Will. 4, c. 50.
Persons aggrieved may appeal.

By 5 & 6 Will. 4, c. 50, s. 88, when any such certificate shall have been so given as aforesaid, (*ante*, p. 1034,) it shall and may be lawful for any person who may think that he would be injured or aggrieved if any such highway should be ordered to be diverted and turned or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped up as aforesaid, to make his complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor 10 (a) days' notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required, within 48 hours after the receipt of such notice, to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway; provided that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party: Provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid. (See form of notice of appeal, *post*, *Forms*.)

Notice and grounds of appeal to be given.

The power of appeal given by this section is against the certificate of justices, and the sessions have jurisdiction to decide upon any

(a) But the time seems now to be altered to 14 days by 12 & 13 Vict. c. 45, s. 1.

substantial defect appearing on the face of the certificate; they are not limited to trying by a jury the questions specified in sect. 89. (*Reg. v. Justices of Worcestershire*, 23 *L. J. M. C.* 113.)

The appeal under this section must be to the sessions for the county, riding, division, or shire within which the highway is, not to a particular adjournment held within a particular division. (*R. v. Suffolk (JJs. of)*, 17 *L. J.* 143, *M. C.*); therefore a notice of appeal was held bad in *R. v. JJs. of Lancashire*, 27 *L. J. M. C.* 161, which was served on the 24th of June, the county sessions beginning on the 29th of June at L., although the sessions for the division of M., within which the road in question was situated, were not held by adjournment until the 6th of July. It is a condition precedent to the right of appeal that due notice of appeal, and of the grounds thereof, be given in writing to the surveyor.

Sect. 89. In case of such appeal the justices at the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of 12 disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway, either entirely or subject as aforesaid, or for diverting, turning, and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway, either entirely or subject as aforesaid; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid.

The 87th section, as we have seen, allows the sessions to decide upon the propriety of confirming an order or certificate for diverting more highways than one wholly or in part.

Sect. 90. The court of quarter sessions is hereby authorised and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not; and such costs and expenses shall be paid by the surveyor or other party as aforesaid at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given; and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said court of quarter sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this act. (How penalties are recoverable, see *post*, *Recovery of Penalties*.)

For the law as to appeals in general, see *ante*, tit. "*Appeal*," and as to appeals in other cases under the highway act, see pp. 1038, 1090.

It would seem that the person entitled to appeal under the above provisions must be one who would sustain some special and peculiar injury by the diversion, &c., of the way, such as being deprived of the use of the way which he has been in the constant habit of using for some period, or the loss of custom in his trade, or the like; at all

13. *Of the widening, &c., of.*
5 & 6 Will. 4, c. 50.

In case of appeal, jury at sessions to determine whether new highway is unnecessary, &c.

Proceedings when jury decide that way is unnecessary, &c.

The same when jury decide to the contrary.

Costs of appeal may be awarded.

Observations, &c. on enactments.

Who entitled to appeal.

13. *Of the widening, &c., of.*

Notice of appeal.

events, the provisions do not extend to any captious person whatever. (See *R. v. Essex*, 5 B. & C. 431; *R. v. Williamson*, 7 T. R. 32.)

The notice of appeal must state that the appellant is injured or aggrieved, or it must appear therefrom that such is the case. (*R. v. Essex*, 5 B. & C. 431; *R. v. Justices of Yorkshire*, 7 B. & C. 678; *R. v. Somersetshire*, 7 B. & C. 681, n.) Under the repealed act 55 Geo. 3, c. 68, it was held that it sufficiently appeared that the appellant was a party aggrieved, where the notice stated that he and his tenants, occupiers of a farm and lands near the way in question, and who had theretofore used and had a right to use it, and all other persons and the public, would be put to great inconvenience. (*R. v. W. R. of Yorkshire*, 4 B. & A. 685.) And under the same enactment a notice was held sufficient which stated that the appellants were aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up had been put and kept in a proper state of repair. (*R. v. Adey*, 4 N. & M. 365. And see *Wilks v. Hungerford Market*, 1 *Hodges*, 281.)

The 10 days' notice of appeal are to be reckoned exclusively of the first 6, inclusive of the last day. (*R. v. W. R. of Yorkshire*, 4 B. & A. 685; *R. v. Goodenough*, 2 A. & E. 463. See note (a), p. 1038.)

To what sessions
appeal to be made.

It should seem that the appeal must be made to the quarter sessions held next after the expiration of 4 weeks from the day the certificate was lodged with the clerk of the peace, without reference to any notice which the appellant may have had of the intended alteration. (*R. v. Staffordshire*, 3 East, 150.)

Proceedings at
sessions.

A footpath led from the hamlet of Wyke to a turnpike-road, which led, in one direction, to the town of Axminster, and in the other to various other places. It was proposed to divert a part of this footpath, by making it join the road at a point somewhat nearer to Axminster. Two justices certified (under the 5 & 6 Will. 4, c. 50, s. 85), for the diversion of this footpath, described as leading "from W. to A." and stated in their certificate that the intended footpath was "nearer and more commodious" than the old. Against this diversion an appeal was tried at the quarter sessions, under sect. 88; and the grounds of appeal were, that, reference being had to the "various places with which the original footpath communicated, the new line was not nearer and more commodious than the old." It appeared that the proposed new line of footpath joined the turnpike-road at a point nearer to Axminster than the old, and was, consequently, nearer as between Wyke and Axminster only, but it was not so near as between Wyke and the other places mentioned;—Held, that the jury were properly directed to construe the word "near" not as between W. & A., but as between the point at which the new and old lines of footpath diverged, and the point where the old line reached the road. (*Reg. v. Shiles*, 1 Q. B. 919.)

In that case it was also held, that the jury having found that the new path was not nearer than the old, but that it was more commodious, the order for diverting the footpath could not be made, as it was necessary, under sect. 89, that the substituted line should be both "nearer" and more "commodious;" but this point was expressly overruled in *Reg. v. Phillips*, 1 L. R. Q. B. 648, where it was held that if the proposed new highway be either nearer or more commodious, the justices may certify for the diversion of the old highway.

Under the 108th sect. of the 5 & 6 Will. 4, c. 50, the quarter sessions may state a case for the opinion of the court of Queen's Bench, informing them how the appeal was left to the jury, and asking them their opinion whether it was correctly left. (*Id.*)

Costs of appeal.

The 90th sect., as to costs, is more extensive in its operation than the 80th sect. of the repealed act 13 Geo. 3, c. 78. Under that enactment, where notice of appeal against an order for diverting a footway

was given, and the order was not filed with the clerk of the peace for inrolment, but the justices gave the appellant notice that they intended to abandon the order, it was held that the justices at the sessions had no power to award to the appellant the costs of preparing to try the appeal. (*R. v. Wing*, 4 B. & C. 114.)

The quarter sessions have no power, under the 90 sect. of the present act, to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they, during the sessions, adopt his decision, and incorporate it in the order. (*Sellwood v. Mount*, 1 Q. B. 726; *Reg. v. Clark*, 9 L. J. M. C. 91; ante, tit. "Appeal" and "Costs.")

The sessions are bound, by sect. 90, to award costs to the person prosecuting or resisting an appeal, whether the appeal be tried or not, and therefore although the appeal had been struck out, no one appearing when it was called on, the court of Queen's Bench held that an application to enter could be made at any time during the day, and ordered the appeal to be reinstated. (*Reg. v. Justices of West Riding*, 31 L. J. M. C. 271.)

The non-payment of costs awarded by an order of quarter-sessions under that sect. is not an offence forming a subject for a conviction under the 101st and 103rd sects. (*post*, p. 1088); but the non-payment of them may be enforced by a distress warrant, issued by 2 justices under the 103rd sect., grounded directly upon the order of sessions. (*Sellwood v. Mount*, *supra*; 1 Q. B. 726.) Such a distress warrant is bad, if it do not show on the face of it an order of sessions for the payment of a specific sum as costs. (*Ib.*)

And where such a distress warrant did not recite any order of quarter sessions for the payment of such costs, but was founded upon a subsequent conviction by 2 justices out of sessions, for non-payment of them; it was held, that the warrant was illegal, and that no property passed to the vendee of goods seized and sold under it. (*Lock v. Sellwood*, 1 Q. B. 736; *Sellwood v. Mount*, 1 Q. B. 726.)

The justices, out of sessions, cannot award costs under the 90th sect. (*Ib.*)

3. The Order for stopping up, &c.

By 5 & 6 Will. 4, c. 50, s. 91, If no such appeal be made (a), or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert and turn and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this act is mentioned in regard to highways to be widened (s. 82, ante, p. 1030); and the proceedings thereupon shall be binding and conclusive on all persons whomsoever; and the new highways so to be appropriated and set out shall be and for ever after continue a public highway to all intents and purposes whatsoever; but no old highway (except in the case of stopping up of such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by 2 justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him inrolled amongst the records of the court of

5 & 6 Will. 4, c. 50. If no appeal be made, or, if dismissed, sessions to make order for stopping, &c., ways.

New way shall be a public one.

Old way when to be stopped in case of a diversion.

(a) See *R. v. Justices of Worcestershire*, 2 B. & A. 228, where it was held, under the repealed act, 55 Geo. 3, c. 68, that the sessions had a right

to inquire whether the order, though there was no appeal, was made by proper authority before they confirmed it.

13. *Of the widening, &c., of.*

Observations.

Decisions under repealed acts.

quarter sessions next after such order as aforesaid shall have been made pursuant to the directions hereinbefore contained.

Prior to this enactment the order for stopping up or diverting a highway was to be made by 2 justices, and not by the quarter sessions.

Under the repealed act 55 Geo. 3, c. 68, it was held that justices could not stop a highway out of their jurisdiction. (*R. v. Milverton*, 5 A. & E. 841.)

By stat. 2 & 3 Will. 4, c. 64, s. 36, sched. (O.) 30, Clifton is made a part of the parliamentary borough of Bristol, which is a county of itself. Except so far as that act operated, it was in the county of Gloucester:—Held, that, after the passing of the Corporation Act, 5 & 6 Will. 4, c. 76, ss. 7, 8, the Gloucestershire justices could not make an order under the 55 Geo. 3, c. 68, for diverting a footway in Clifton, their jurisdiction, in such cases, being transferred to the justices of Bristol. (*R. v. Gloucester (Justices)*, 4 A. & E. 689.)

Where an order of justices, under the repealed act 55 Geo. 3, c. 68, for diverting a public highway and substituting a new one for it, contained also an order for stopping up the old highway, it was held bad, inasmuch as the magistrates had no power, under that act, to stop up the old road until the new one had been made. (*R. v. Kent*, 10 B. & C. 477; *R. v. Justices of Middlesex*, 5 A. & E. 626: see the 91st sect. of the present act.)

The 4th sect. of the 55 Geo. 3, c. 68, required a similar certificate to the above, from two justices, as to the state of the new highway, before stopping up the old one. Where an order for diverting a highway had been made, and 3 of the justices by whom such order was signed afterwards signed another order, by which, after reciting "that they were satisfied that the new way was properly made, and fit for the reception of travellers," it was ordered that the old way should be stopped up and sold; it was held, that such recital was a sufficient certificate. (*De Ponthieu v. Pennyfeather*, 5 Taunt. 634.)

Order of sessions conclusive.

It will be seen that the 91st section provides that the order of sessions and proceedings thereon shall be binding and conclusive on all persons whomsoever. And the 107th section expressly takes away the certiorari. The 108th section, however, enacts that in the case of an appeal being determined by the quarter sessions, a special case may be granted for the opinion of the Court of Queen's Bench. (See the cases of *R. v. Clerk*, 1 B. & C. 21, 622; *R. v. Townshend*, 5 B. & Ald. 420; *R. v. Kenyon*, 6 B. & C. 640; *R. v. Justices of Kent*, 10 B. & C. 407, on the 55 Geo. 3, c. 68, s. 4, under which the order, though confirmed by the quarter sessions, might be removed by certiorari into Queen's Bench; and see *R. v. Justices of Middlesex*, 5 A. & E. 626.)

This section taken together with s. 85 (p. 1033) shows clearly that the alterations are not to be made until after the quarter sessions have ended. The order and the certificate of justices made pursuant to s. 85, need not do more than declare that the old highway will be unnecessary when the proposed new highway is completed as proposed. (*Reg. v. Phillips*, 1 L. R. Q. B. 662.)

Order under repealed act for stopping highway effectual, before actual stoppage.

It seems, that if an order under the now repealed enactment of 55 Geo. 3, c. 68, s. 2, had been properly made and enrolled for stopping a highway, it was not necessary to have made such order completely effectual, that an actual stoppage should have taken place. (*R. v. Inhabitants of Milverton*, 5 A. & E. 841.)

4. *Repair of Highways Diverted, &c.*

Party liable to repair of old highways to repair new highways.

By 5 & 6 Will. 4, c. 50, s. 92, in every case in which a highway shall have been turned or diverted under the provisions of this act, the parish or other party which was liable to the repair of the old highway shall be liable to the repair of the new highway, without any

reference whatever to its parochial locality. And see s. 93, as to the repair of roads, which persons are bound to repair *ratione tenuræ*, &c., after they have been diverted, &c. 14. *Special sessions for, &c.*

As to repairing a turnpike-road after it has been diverted, &c., see post, "*Highways, Turnpike.*"

5. *Provisions as to widening and diverting, &c. Highways, extended to Highways repairable ratione tenuræ.*

Sect. 93. The powers and provisions in this act contained, with respect to the widening (*ante*, p. 1030), and enlarging, diverting, turning, or stopping up any highway, shall be applicable to all highways which any person, bodies politic or corporate, is or are bound to repair by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever; and that when such last-mentioned highways are so widened or enlarged, turned or diverted, the same shall and may, by an order of the justices at a special sessions for the highways, be placed under the control and care of the surveyor of the parish in which such highways may be situate, and shall be from time to time thereafter repaired and kept in repair by the said parish: provided also, that the said highways so widened, enlarged, diverted, or turned, shall be viewed by 2 justices of the peace, who shall make a report thereof to the justices at a special sessions for the highways; and such last-mentioned justices shall, by an order under their hands, fix the proportionate sum which shall be annually paid, or shall fix a certain sum to be paid, by such person, bodies politic or corporate, his or their heirs, successors, or assigns, to the said surveyors of the parish, in lieu of thereafter repairing the said part of the said old highway: and the order of the said last-mentioned justices shall be and continue binding on all such persons, bodies politic or corporate, their heirs, successors, or assigns; and in default of payment thereof, the said surveyor shall proceed for the recovery of the same in the manner as any penalties and forfeitures are recoverable under this act.

Provisions as to widening, &c., of highways to extend to all highways which persons are bound to repair *ratione tenuræ*, &c.

Justices to fix annual or other amount payable by party previously bound to repair.

XIV. Special Sessions for Purposes of Highways.

By 5 & 6 Will. 4, c. 50, s. 45, It shall and may be lawful for the justices of the peace within their respective divisions, or any 2 or more of them, and they are hereby required, to hold not less than 8, nor more than 12 special sessions in every year for executing the purposes of this act, the days of the holding thereof to be appointed at a special sessions to be held within 14 days after the 20th day of March in every year: provided always, that it shall not be necessary to cause any notice to be given or sent to any justice acting and residing within such limits of the day or time of the holding thereof; and at the said special sessions held next after the 25th day of March in every year, the surveyor of each of the parishes within their respective divisions shall verify his accounts (*ante*, p. 1016), and shall make a return in writing to such special sessions of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and watercourses appertaining thereto, and of all nuisances and encroachments, if any, made upon the several highways within the parish for which he was surveyor, as well as the extent of the different highways which the said parish is liable to repair, what part thereof has been repaired, and with what materials, at what expense, and what was the amount levied during the time he was surveyor of the said parish. See form of return, No. 16.

Justices to hold special sessions for purposes of this act.

Surveyor's accounts, and state of roads, &c.

See "*Highways, Turnpike,*" for powers given to justices, at a special sessions for the highways, on proof of the deficiency of the funds, &c.,

17. *Nuisances, &c., on.* of a turnpike trust, to order payment to such trust of a portion of the highway rate.

In *R. v. Justices of Leicester* (7 B. & C. 6), it was decided that the 54 Geo. 3, c. 84, as to justices acting in Michaelmas special sessions, was merely directory, and that the sessions might, notwithstanding, be held at another time, see note to s. 11, *ante* (p. 1013).

As to special sessions in general, see "*Sessions*."

XV. Width of Cartways.

Cartways to be twenty feet wide, horseways eight feet, and footways three feet.

By 5 & 6 Will. 4, c. 50, s. 80, The said surveyor shall and he is hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cartway leading to any market town 20 feet wide at the least, and every public horseway 8 feet wide at the least, and to support and maintain every public footway by the side of any carriageway or cartway 3 feet at the least, if the ground between the fences including the same will admit thereof: provided nevertheless, that nothing herein contained shall require any surveyor to make or form any public footway without the consent of the inhabitants in vestry assembled.

Surveyors not to make public footways without consent of vestry.

The surveyor has no authority to pare away the bank of a fence by the side of a road under this clause. (*Alston v. Scales*, 9 Bing. 3.)

It is frequently difficult to determine how far a highway extends in width; in such a case it would be a question for a jury. (See *Brownlow v. Tomlinson*, 1 M. & Gr. 484; *R. v. Wright*, 3 B. & Ad. 681; *R. v. The London & Birmingham Railway Company*, 1 Railw. Cas. 317.)

See the provision in the turnpike act, 3 Geo. 4, c. 126, s. 125.

XVI. What to be deemed the Centre of Highway.

What shall be deemed the centre of the highway.

By 5 & 6 Will. 4, c. 50, s. 63, Where in this act any matter or thing is directed or forbidden to be done within a certain distance of the centre of the highway, that portion of ground shall be deemed and taken to be the highway which has been maintained by the surveyor as highway, and repaired with stones or other materials used in forming highways, for the 6 months immediately preceding; and the centre of the highway shall be the middle of such highway, where a line being drawn along the highway, or a point marked, an equal number of feet of highway which have been so maintained and repaired as aforesaid for 12 months before shall be found on each side of such line or mark.

XVII. Nuisances, Annoyances, and Obstructions on Highways.

Division of subject.

Herein of nuisances, annoyances, and obstructions, &c., arising from

1. *Trees and Hedges, &c.*, p. 1045.
2. *Ditches and Drains, &c.*, p. 1047.
3. *Encroachments on Highways*, p. 1048.
4. *Pits, Steam-engines, Machines, Windmills, Kilns, Railways, &c.*, p. 1050.
5. *Gates*, p. 1051.
6. *Carts and Carriages, Misbehaviour of Drivers, &c.*, p. 1052.
7. *Wheels and Weight of Carriages, &c.*, p. 1054.

8. *Surveyor leaving Things on Highway at Night*, p. 1054.
9. *Riding, &c., on Footways, tethering Horses, injuring Road, damaging Banks, Direction-posts, &c., playing at Games, encamping on, making Fires, baiting Bulls, laying Timber, running Pith, wilfully obstructing Passage, &c.*, p. 1054.
10. *Injuries and Annoyances to Highways at Common Law*, p. 1055.
11. *Securing Offenders*, p. 1061.
12. *Power of Surveyor to remove Nuisances*, p. 1062.
13. *Power of Surveyor to impound Cattle straying on Highways*, p. 1063.
14. *Abatement of Nuisances by Common Law*, p. 1064.
15. *Indictment and Punishment, &c., for Nuisances*, p. 1064.
16. *Presentment for*, p. 1065.
17. *Action for*, p. 1065.
17. *Nuisances, &c., on.*
5 & 6 Will. 4, c. 50.

1. TREES AND HEDGES.

By 5 & 6 Will. 4, c. 50, s. 64, No tree, bush, or shrub, shall hereafter be planted on any carriageway or cartway, or within the distance of 15 feet from the centre thereof [see s. 63 (p. 1044)], but the same shall respectively be cut down, grubbed up, and carried away by the owner or occupier of the land or soil within 21 days after notice to him or his agent by the surveyor (a), on pain of forfeiting for every neglect the sum of 10s.

Sect. 65. If the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop ground, house, building, or court yard of the owner thereof) (b) growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway, by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining (c) to such carriageway or cartway, to appear before the justices at a special sessions for the highways, to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway should not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning and lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices: and if such justices shall order (d) and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within 10 days after a copy of such order shall have been left at the usual place of abode of the said owner or of his steward or agent, and in default thereof shall forfeit, on conviction, a sum not exceeding 40s.; and the said surveyor, if the

No tree, &c., allowed to be planted within fifteen feet of centre of carriage way.

Mode of proceeding if highway is prejudiced by hedges, &c.

If order of jus-

(a) See form of notice, No. 27.
See the form of conviction, No. 31.

(b) See *Frompton v. Tiffin*, 2 Jur. 986.

(c) This means immediately ad-

joining, and if a slip of land intervene it does not apply, 8 Jur. 783.

(d) See *post*, p. 1047, and form of order, *post*, No. 32.

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.
 Justices not complied
 with, surveyor
 may cut and lop
 trees.

order of the said justices is not complied with, shall and he is hereby authorised and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this act; and the said surveyor shall be reimbursed by the owner as aforesaid what charges and expenses he shall be at in cutting, pruning, and plashing such hedges, and pruning and lopping such trees, and the removal of such obstruction, over and above the said forfeiture; and it shall and may be lawful for the justices at a special sessions for the highways, upon proof to them made upon oath, to levy (a) as well the expenses of cutting, pruning and plashing such hedges, or pruning and lopping such trees, or removal of such obstructions as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, in such manner as distresses and sales for forfeitures are authorised and directed to be levied by virtue of this act. [As to the forfeitures, see ss. 101, 102, and 103, *post*, p. 1088.]

The jurisdiction of justices, under 5 & 6 Will. 4, c. 50, s. 65, where the highway is prejudiced by trees, is confined to cases where the trees are growing on land next adjoining the carriage way. (*Jenney v. Brooke*, 2 Q. B. 265; 6 Q. B. 324.) Where an order under that section recited that the plaintiff had neglected to cut, prune, or plash his trees and hedges on his farm, "whereby the sun and wind were excluded from the carriage way, &c., to the damage thereof, and whereby also obstructions were caused on the said carriage way;" and ordered him to cause the said hedges to be cut, and the said trees to be pruned, and the said obstruction complained of, to the injury of the said highway, removed: it was held, that the exclusion of the sun and wind being one of the injuries complained of, the order was bad in part for not stating the extent to which the cutting, &c. should take place with reference to that injury; but that a direction to cut, &c., so as to prevent the sun and wind from being excluded, would have been sufficient, without any more precise orders as to the extent of the cutting: it was also held, that the order was bad as to the trees, for not showing that they were not planted for ornament, &c. (*Ib.*) The specific obstruction should be pointed out and the attention of the owner called to the manner in which he is required to do what is ordered.

Time of cutting
 hedges and trees,
 and as to felling
 timber trees.

Sect. 66. Provided always that no person shall be compelled nor any surveyor permitted to cut or prune any hedge at any other time than between the last day of September and the last day of March; and that no person shall be obliged to fell any timber trees growing in hedges at any time whatsoever except where the highways shall be ordered to be widened or enlarged as herein mentioned, or then to cut down or grub up any oak trees growing in such highway, or in such hedges except in the months of April, May, or June, or any ash, elm, or other trees in any other months than December, January, February, or March.

Form of order to
 cut hedges.

At a special session for the highways, an order was made reciting a complaint by the surveyor, that the owner had refused and neglected to cut, prune, or plash certain hedges, "whereby the sun and wind were excluded from the said carriageway or cartway, to the damage thereof, and whereby also obstructions were caused in the said carriageway or cartway, contrary to the statute," &c.; that the owner had appeared and the offence was proved; and the justices did thereby order the owner "to cause the said hedges to be cut, pruned, or plashed, and the said obstruction complained of, to the injury or

(a) See *post*, p. 1088.

damage of the said highway, removed, within 10 days from the service hereof." The order being served upon the owner, he cut away some part of the hedge, but the surveyor considering the order not properly complied with, summoned him before two justices, who imposed a penalty upon him; and, after 10 days, the surveyor himself cut the hedge:—Held, first, that the order was bad for not specifying more particularly in what manner, and to what extent, the owner was to cut the hedge; secondly, that this was a substantial defect, and not one merely of form; thirdly, that the surveyor was liable in trespass for cutting the hedge, although (as was found by the jury) he had not cut it more than the order required, and although the owner had not cut it so much as the order required; and although the owner had acquiesced (as was contended) in the goodness of the order by partially obeying it; for the surveyor had no power to act except in the owner's default, which could not take place without a valid order. (*Brook v. Jenney*, 2 Q. B. 265, and 6 Q. B. 323.) And per Lord Denman, C. J., "The attention of the owner ought to be called to the manner in which he is required to do what is ordered. It is not enough to call upon him to cause the hedges to be cut, pruned, or plashed, when he may well be in doubt what it is that these words mean; nor to direct him to remove the said obstruction complained of without pointing out what the obstruction is, nor whether it is specifically limited to the exclusion of the sun and wind."

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

Surveyor liable where order invalid.

The court will not grant a rule *nisi* for a mandamus to compel justices to issue their warrant to levy the expenses of cutting a hedge, pursuant to the above, s. 65, unless it appears that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. (*Ex parte Whitmarsh*, 8 Dowl. 431.)

Expenses of cutting.

It is said, that he who hath trees adjoining a highway and hanging over it, to the annoyance of the people, is bound by common law to lop the same, and any other person may lop them, so as to abate the nuisance. (1 *Hawk.* c. 76, s. 52: and see *Bac. Ab. Highway* (E).)

Common-law right to lop trees.

2. DITCHES, DRAINS, &C.

By 5 & 6 Will. 4, c. 50, s. 67, the said surveyor, district surveyor, or assistant surveyor, shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges, as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid (*ante*, p. 1002).

Surveyor to make and keep open ditches, &c., and to lay trunks, &c., through lands adjoining highway, paying for damage if any incurred.

The Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 22, which is to be deemed part of the law relating to highways, contains provisions for the making and cleansing of ditches adjoining highways, see NUISANCES. This section does not make the ascertaining of the damage done and tender of payment of the sum so ascertained, conditions precedent to the exercise of the power of the surveyor to enter upon land. (*Peters v. Clarson*, 13 L. J. M. C. 153.)

Where a nuisances removal committee having under 18 & 19 Vict. c. 121, s. 22, laid down a sewer to render innocuous a drain constructed by the surveyor of the highway before the act 18 & 19 Vict. c. 121, was passed, the court of Queen's Bench held that whether the highway rates were available or not as an auxiliary fund, the committee were bound in the first instance to assess under s. 22 all houses, buildings, and premises using the sewer. (*Reg. v. Gosse*, 3 E. & E. 277.)

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

Owner, occupier, &c., not to alter such ditches without consent.

Sect. 68. If any owner, occupier, or other person shall alter, obstruct, or in any manner interfere with any such ditches, gutters, drains, or water-courses, trunks, tunnels, plats, or bridges, after they shall have been made by or taken under the charge of such surveyor or district surveyor, and without his authority and consent, such owner, occupier, or other person shall be liable to reimburse all charges and expenses which may be occasioned by reinstating and making good the works so altered, obstructed, or interfered with, and shall also forfeit any sum not exceeding 3 times the amount of such charges and expenses.

By the 13 Geo. 3, c. 78, s. 8, *occupiers* of land were required, under a penalty of 10s., to make these ditches and watercourses, and to lay sufficient trunks, &c., after 10 days' notice by the surveyor; but that section is now repealed by the 5 & 6 Will. 4, c. 50.

In a case where the surveyor directed a sewer to be continued, notwithstanding the provisions of a local act, which declared that no ditch, &c., should be arched over without the consent of the trustees under the act, under a penalty of 50*l.*, debt was brought against him under that statute. It was urged on his behalf that the sewer was begun before he took any part in it—that he was in fact the servant of those for whom the work was done, and that the mere direction to proceed could not render him liable to the penalty. But the court held, that there could not be a doubt of his liability, and the rule for entering a nonsuit was discharged. (*Woodward v. Cotton*, 1 C. M. & R. 44.)

Nuisance at common law.

It is a nuisance at common law, and punishable accordingly, to suffer the highway to be incommoded by reason of the foulness, &c., of the adjoining ditches; and it is said that the owner of land next adjoining to the highway ought of common right to scour his ditches, but that the owner of land next adjoining to such land is not bound by the common law to do so without a special prescription. (1 *Hawk. P. C. c.* 76, s. 52; *Bac. Abr. Highway* (E).)

3. ENCROACHMENT ON HIGHWAYS.

Penalty for encroaching on highway.

Encroachment to be taken down by surveyor.

Expenses of removal, &c., enforceable by distress.

Encroachment by a fence.

By 5 & 6 Will. 4, c. 50, s. 69, if any person shall encroach by making, or causing to be made any building, hedge, ditch, or other fence on any carriageway or cartway within the distance of 15 feet from the centre thereof (a), every person so offending shall forfeit, on conviction (b), for every such offence, any sum not exceeding 40s.; and the surveyor who hath the care of any such carriageway or cartway shall and he is hereby required to cause such building, hedge, ditch, or fence to be taken down or filled up at the expense of the person to whom the same shall belong; and it shall and may be lawful for the justices at a special sessions (c) for the highways, upon proof to them made upon oath, to levy as well the expenses of taking down such building, hedge, or fence, or filling up such ditch as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, in such manner as distresses and sales for forfeitures are authorised and directed to be levied by virtue of this act. [As to the mode of recovering penalties, see ss. 101, 103; p. 1088.]

A fence, to come within this section, must be within 15 feet of the centre of the road, and also on the road. Thus, where a road was 9 feet wide, and there was a piece of unenclosed land at the side of it, also 9 feet wide, which land was so rough and uneven that no carriage ever did, or could, go over it, *Maule, J.*, held that the surveyor of

(a) What shall be deemed the centre of the highway, see p. 1044.

(b) See form of conviction, No. 33.

(c) See *ante*, p. 1043.

the highway was not justified in pulling down a fence, that the owner of the adjoining field put upon this rough piece of land. (*Evans v. Oakley*, 1 C. & K. 125.)

17. *Nuisances, &c., on.*

Upon the trial of an indictment for encroaching on a highway by building a chapel, the jury found that a portion of the site of the chapel mentioned in the indictment and of the land inclosed by iron railings, also mentioned in the indictment, was a part of the parish highway, but that the obstruction to the public was inappreciable. A verdict of not guilty was entered, which the court of Queen's Bench decided was right. (*R. v. Lepine*, 15 L. T. 158.)

5 & 6 Will. 4, c. 50

There was no provision in the statute 13 Geo. 3, c. 78, empowering surveyors to remove a building or house erected upon a highway; and therefore, in trespass against surveyors of the highways for pulling down a watch-house, it was held, that the 82nd section of that act did not enable them, under a plea of not guilty, to justify the removing it, as being a nuisance on the highway. (*Witham Navigation v. Padley*, 4 B. & Adol. 69.)

Observations and decisions.

By 27 & 28 Vict. c. 101, s. 51, from and after the passing of this act if any person shall encroach by making or causing to be made any building, or pit, or hedge, ditch, or other fence, or by placing any dung, compost, or other materials for dressing land, or any rubbish, on the side or sides of any carriageway or cartway within 15 feet of the centre thereof, or by removing any soil or turf from the side or sides of any carriageway or cartway, except for the purpose of improving the road, and by order of the highway board, or, where there is no highway board, of the surveyor, he shall be subject on conviction for every such offence to any sum not exceeding 40s., notwithstanding that the whole space of 15 feet from the centre of such carriageway or cartway has not been maintained with stones or other materials used in forming highways; and it shall be lawful for the justices assembled at petty sessions, upon proof to them made upon oath, to levy the expenses of taking down such building, hedge, or fence, or filling up such ditch or pit, and removing such dung, compost, materials, or rubbish as aforesaid, or restoring the injury caused by the removal of such soil or turf, upon the person offending: Provided always, that where any carriageway or cartway is fenced on both sides no encroachment as aforesaid shall be allowed whereby such carriageway or cartway shall be reduced in width to less than 30 feet between the fences on each side.

As to encroachment on highways.

Sect. 69, it will be seen, does not say that every way shall be 30 feet wide; and where a building, &c., is not on the highway, but within 15 feet of the centre, a surveyor would not under this clause be authorised to remove it, &c. (*Lowen v. Kaye*, 4 B. & C. 3.)

The summary powers conferred upon justices by this section are confined to recent encroachments, and the encroachment itself must be in the same way as that which has been used and enjoyed by the public as a carriage or cart way; therefore a cottage which was in fact built upon the highway, but upon the site of an old erection, was held not to be an encroachment, because, by s. 63, the highway is defined to be that part which has been recognised as road, and as such repaired by the surveyor within 6 months. (*Chapman v. Robinson*, 28 L. J. M. C. 30.)

A local act prohibited the erection or continuance of any building within 10 feet of the road, and declared that the footpaths should be subject to the act, and be part of the road: it was held that an open shop having its front built on the foundation of an old wall, immediately adjoining the footpath, and connected by a roof with the front of the house, which was more than 10 feet from the road, was a building within the meaning of the act. (*R. v. Gregory*, 5 B. & Ad. 555.)

A conviction under this section is a defence to an action against a surveyor of highways, for pulling down a house alleged to have been

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

built upon a carriageway, although the conviction was wrongly made, because every conviction under s. 19 involves a judgment *quod proster-natur*, which the surveyor is bound to execute. (*Keane v. Reynolds*, 2 E. & B. 748.)

4. PITS, STEAM-ENGINES, MACHINES, WINDMILLS, KILNS, RAILWAYS, &c.

No pit to be sunk,
or steam-engine,
machine,
or windmill to be
erected,

or fire to be made
within certain
distance of roads,
unless, &c.

How penalty to
be levied, &c.

Proviso as to
windmills, &c.
erected at passing
of act.

Proprietors of
railways to erect
gates, &c., where
they cross high-
ways.

By 5 & 6 Will. 4, c. 50, s. 70 (a), from and after the commencement of this act it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of 25 yards, nor any windmill within 50 yards, from any part of any carriageway or cartway, unless such pit or shaft, or steam-engine, gin, or other like engine or machinery, shall be within some house or other building, or behind some wall or fence, sufficient to conceal or screen the same from the said carriageway or cartway, so that the same may not be dangerous to passengers, horses, or cattle; nor shall it be lawful for any person to make or cause to be made any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of cokes, within the distance of 15 yards from any part of the said carriageway or cartway, unless the same shall be within some house or other building, or behind some wall or fence, sufficient to screen the same from the same carriageway or cartway as aforesaid; and in case any person shall offend in any of the cases aforesaid, every such person so offending shall forfeit and pay any sum not exceeding 5*l.* for each and every day such pit, shaft, windmill, steam-engine, gin, machine, or fire shall be permitted to continue contrary to the provisions of this act; which said penalties shall be levied, recovered, and applied in such and the same manner as any penalty or forfeiture for any other offence on any highway may be levied, recovered, and applied: provided, that nothing herein contained shall be construed to restrain any person or persons from using, repairing, rebuilding, or enlarging any windmill, steam-engine, gin, or other like machine, or any kiln, or other erection used for the purpose of calcining or burning of ironstone, limestone, bricks, or clay, or the making of cokes, which may have been erected and may be in existence at the passing of this act (b).

See a similar provision in the Turnpike Act, 3 Geo. 4, c. 126, s. 127, *post*, prohibiting the erection of windmills within two hundred yards of the road.

The erection of these steam-engines, &c., might be a nuisance at common law, and punishable accordingly, see *post*, p. 1064.

Sect. 71. Whenever a railroad shall cross any highway for carts or carriages, the proprietors of the said railroad shall make and maintain good and sufficient gates at each of the said crossings, and shall employ good and proper persons to attend to the opening and shutting of such gates, so that the persons, carts, or carriages passing along such road shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad; and any complaint for any neglect in respect of the said gates shall be made within ten days after the said neglect to one justice, who may summon the party so complained against to appear before the justices at

(a) This section applies to the case of a portable engine upon wheels, drawn by horses from place to place, and used to drive a thrashing machine within a barn, without being fixed into the ground. (*Smith v. Stokes*, 32 L. J. M. C. 199.) But the owner cannot be convicted under this

section when there is no evidence that he ordered it to be erected within the prohibited distance. (*Harrison v. Leaper*, 26 J. P. 69, 373.)

(b) The provision of this section as to steam-engines is extended to turnpike roads by 27 & 28 Vict. c. 75, s. 1, *post*, "Turnpike."

their next special sessions for the highways, who shall hear and decide upon the said complaint, and the proprietor so offending shall forfeit any sum not exceeding 5*l*.

17. *Nuisances, &c., on.*

By the 2 & 3 Vict. c. 45, after reciting the above enactment, and the 5 & 6 Will. 4, c. 50, s. 13, it is enacted, that wherever a railroad crosses or shall hereafter cross any turnpike road or any highway or statute labour road for carts or carriages in Great Britain, the proprietors or directors of the company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad; and any complaint for any neglect in respect of the said gates shall be made within one calendar month after the said neglect to any justice of the peace, or if in Scotland to the sheriff of the county, who may summon the party so complained against to appear before them or him at the next petty session or court to be holden for the district or division within which such gates are situate, who shall hear and decide upon the said complaint; and the proprietor or director so offending shall for each and every day of such neglect forfeit any sum not exceeding 5*l*. together with such costs as to the justices or sheriff depute aforesaid before whom the conviction shall take place shall seem fit.

2 & 3 Vict. c. 45.

Complaint for neglect.

Penalty for.

Sect. 2. The penalties by this act imposed, and the costs to be allowed and ordered by the authority of this act, shall in England be recovered and applied in the same manner as any penalties and costs under the said act, and in Scotland shall be recovered and applied to the maintenance of the statute labour roads within the district where the offence is committed.

How penalties to be recovered and applied.

By 5 & 6 Vict. c. 55, s. 9 (a), it is enacted that, notwithstanding any thing to the contrary contained in any act of Parliament heretofore passed, such gates shall be kept constantly closed across each end of such turnpike or other roads, in lieu of across the railway, except during the time when horses, cattle, carts, or carriages passing along such turnpike or other road shall have to cross such railway; and such gates shall be of such dimensions, and so constructed as, when closed across the ends of such turnpike or other roads, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway while the gates are closed: provided always that it shall be lawful for the lords of the said committee (b), in any case in which they are satisfied that it will be more conducive for the public safety that the gates at any level crossing over any such turnpike or other road should be kept closed across the railway, to order and direct that such gates shall be kept so closed, instead of across the road, and such order of the lords of the said committee shall be a sufficient authority for the directors or proprietors of any railway company to whom such order is addressed for keeping such gates closed in the manner directed by the lords of the said committee. See also the 8 & 9 Vict. c. 20, ss. 46, *et seq.*, as to gates across railways or level crossings; and 24 & 25 Vict. c. 71 (*post*, under *Highways, Turnpike*), as to locomotives on roads.

5. GATES.

By 5 & 6 Will. 4, c. 50, s. 81, If any gate across any public cart-way shall be less than 10 feet wide, or any gate across any public horse-way shall be less than 5 feet wide, clear between the posts thereof, then and in every such case, upon notice in writing from the surveyor to the person to whom such gate shall belong, left at

Width of gates across public cart-ways and horse-ways.

(a) An act for the better regulation of railways and the conveyance of troops.

(b) Of her Majesty's privy council.

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

the dwelling-house of such person or his steward or agent, requiring him to enlarge the same, if such person shall neglect for the space of 21 days after such notice shall have been left as aforesaid to remove or enlarge such gate, he shall forfeit a sum not exceeding 10s. for every day he shall so neglect to remove or to enlarge such gate as aforesaid.

See a similar clause to this in the Turnpike Act, 3 Geo. 4, c. 126, s. 125.

As to when gates are nuisances at common law, see p. 1056.

6. CARTS AND CARRIAGES, NAMES OF OWNERS TO BE PAINTED, &C., MISBEHAVIOUR OF DRIVERS, &C.

Names of owners to be painted on all waggons, &c., in a particular manner.

By 5 & 6 Will. 4, c. 50, s. 76, the owner of every waggon, cart, or other such carriage, shall paint or cause to be painted in one or more straight line or lines, upon some conspicuous part of the right or off side of his waggon, cart, or other such carriage, or upon the off side shafts thereof, before the same shall be used on any highway, his christian name and surname, or the style and title by which he is commonly designated, and the place of his trade or abode, or the christian and surname and place of trade or abode of a partner or owner thereof, at full length, in large legible letters in white upon black or black upon white, not less than one inch in height, and continue the same thereupon so long as such waggon, cart or other such carriage, shall be used upon any highway; and every owner of any waggon, cart, or other such carriage, who shall use or allow the same to be used on any highway without the name and descriptions painted thereon as aforesaid, or who shall suffer the same to become illegible, or who shall paint or cause to be painted any false or fictitious name or place of trade or abode on such waggon or cart or other such carriage, shall forfeit and pay, on conviction for every such offence, a sum not exceeding 40s., with or without costs, as to* the justices before whom the conviction shall take place shall think fit.

* *Sic*, in act.

One driver may take charge of two carts, provided they are drawn only by one horse each.

Sect. 77. No one person shall act as the driver of more than two carts, waggons, or other such carriages on any highway: provided always, that it shall and may be lawful for any one person to act as the driver of two carts, waggons, or other such carriages on any highway, and for such carts to pass and travel on any highway being only under the care and superintendence of such single person: provided always, that such carts, waggons, or other carriages, when under the care of only one person, shall not be drawn by more than one horse each, and the horse of the hinder cart, waggon, or other carriage, shall be attached by a rein in length not exceeding 4 feet to the back of the cart, waggon, or other carriage which shall be foremost; and in case the said horse shall not be so attached, the driver of the said carts, waggons, or other carriages, shall forfeit on conviction, the sum of 20s., to be recovered as other penalties are by this act to be recovered.

Drivers of waggons or carts not to ride thereon, unless some other person guide them.

Drivers causing hurt or damage to others, or quitting the road, or driving carriage without owner's name, or not keeping the left or near side, or interrupting

Sect. 78. If the driver of any waggon, cart, or other carriage of any kind, shall ride upon any such carriage, or upon any horse or horses drawing the same, on any highway, not having some other person on foot or on horseback to guide the same (such carriages and carts as are driven with reins, and are conducted by some person holding the reins of all the horses drawing the same, excepted (a)); or if the driver of any carriage whatsoever on any part of any highway shall by negligence or wilful misbehaviour cause any hurt or damage to any person, horse, cattle, or goods conveyed in any carriage passing or being upon such highway, or shall quit the same and go

(a) See form of conviction, *post*, No. 34.

on the other side of the hedge or fence inclosing the same, or negligently or wilfully be at such distance from such carriage or in such a situation whilst it shall be passing upon such highway that he cannot have the direction and government of the horses or cattle drawing the same, or shall leave any cart or carriage on such highway so as to obstruct the passage thereof; or if any person shall drive or act as the driver of any waggon, cart, or other such carriage not having the owner's name as hereby required painted and remaining legible thereon, and shall refuse to tell or to discover the true christian and surname of the owner or principal owners of such waggon, cart, or carriage; or if the driver of any waggon, cart, or other carriage whatsoever, or of any horses, mules, or other beast of draught and burthen, meeting any other waggon, cart, or other carriage, or horses, mules, or other beasts of burthen, shall not keep his waggon, cart, or carriage, or horses, mules, or other beasts of burthen, on the left or near side of the road; or if any person shall in any manner wilfully prevent any other person from passing him, or any waggon, cart or other carriage, or horses, mules, or other beasts of burthen under his care, upon such highway, or by negligence or misbehaviour prevent, hinder, or interrupt the free passage of any person, waggon, cart, or other carriage, or horses, mules, or other beasts of burthen, on any highway, or shall not keep his waggon, cart, or other carriage, or horses, mules, or other beasts of burthen, on the left or near side of the road, for the purpose of allowing such passage; or if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger; every person so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice, or by the oath of one or more credible witnesses, before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5*l.* in case such driver shall not be the owner of such waggon, cart, or other carriage, and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*, and in either of the said cases, shall, in default of payment, be committed to the common gaol or house of correction, there to be kept to hard labour, for any time not exceeding six weeks, unless such forfeiture shall be sooner paid; and every such driver offending in either of the said cases shall and may by the authority of this act, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be conveyed before any justice of the peace, to be dealt with according to law; and if any such driver in any of the cases aforesaid shall refuse to discover his name, it shall and may be lawful for the said justice of the peace before whom he shall be taken, or to whom any such complaint shall be made, to commit him to the common gaol or house of correction, there to be kept to hard labour, for any time not exceeding 3 months, or to proceed against him for the penalty aforesaid by a description of his person and the offence only, without adding any name or designation, but expressing in the proceedings that he refused to discover his name.

The repealed stat. 13 Geo. 3, c. 78, s. 60, imposed a penalty on the driver of a cart, &c., for riding thereon, under circumstances therein mentioned, and authorised a justice on his own view, or upon the oath of one witness, to convict the offender; and in case he refuse to discover his name, or the name of the owner of the cart, &c., he was subjected to a like penalty, and might without warrant be apprehended forthwith by the person seeing the offence committed. But where the driver of a waggon committed an offence within that act in the view of a justice, and placed himself before the board on which his master's name was painted, so as to prevent the dis-

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50. free passage, if not the owner, to forfeit 20*s.*; if he be the owner, 40*s.*

Proceedings if driver will not discover his name.

Decision on repealed act, 13 Geo. 3, c. 78, s. 60.

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

Surveyor's power to detain unknown offenders.

Misconduct of coachmen.

Carrying excessive weight on highway.

Penalty on surveyor allowing any heap of stone, &c., to remain on highway at night.

Persons committing nuisances by riding, &c., on footpaths ;

by tethering horses, &c. ;

by injuring the road or hedges, &c. ;

by damaging banks, direction-posts, milestones, &c. ;

by playing at games ;

by encamping on highway ;

by making fires, &c. ;

covery of the owner, and the justice, in order to ascertain the name, stopped the horses and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership, it was held, on demurrer, that this was a trespass, and gave the driver a right of action. (*Jones v. Owen*, 2 D. & R. 600.)

Sect. 79. empowers the surveyor, assistant surveyor, or district surveyor, or person acting in his aid, &c., to seize and detain, &c., unknown offenders. (See *post*, p. 1061.)

For enactments relative to the misconduct of drivers of public coaches, and for punishing persons occasioning accidents by furious driving, see *post*, "*Stage Coaches*."

7. WHEELS AND WEIGHT OF CARRIAGES, &c.

It is an offence at common law to carry an excessive weight on a highway, so as to injure it. (See *post*, p. 1055.)

8. SURVEYOR LEAVING THINGS ON HIGHWAY AT NIGHT.

By 5 & 6 Will. 4, c. 50, s. 56, if any surveyor or district surveyor shall lay or cause to be laid any heap of stone or any other matter or thing whatsoever upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precaution not having been taken by the said surveyor to guard against the same, he shall forfeit for every such offence any sum not exceeding 5*l*.

9. RIDING, &c., ON FOOTWAYS, TETHERING HORSES, INJURING ROAD, DAMAGING BANKS, DIRECTION POSTS, &c., PLAYING AT GAMES, ENCAMPING, MAKING FIRES, BAITING BULLS, LAYING TIMBER, &c., RUNNING FILTH, &c., WILFULLY OBSTRUCTING PASSAGE.

By 5 & 6 Will. 4, c. 50, s. 72, if any person shall wilfully ride upon any footpath or causeway (a) by the side of any road made or set apart for the use or accommodation of foot passengers ; or shall wilfully lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway ; or shall tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon ; or shall cause any injury or damage to be done to the said highway, or the hedges, posts, rails, walls, or fences thereof ; or shall wilfully obstruct the passage of any footway ; or wilfully destroy or injure the surface of any highway ; or shall wilfully or wantonly pull up, cut down, remove, or damage the posts, blocks, or stones fixed by the said surveyor as herein directed ; or dig or cut down the banks which are the securities and defence of the said highways ; or break, damage or throw down the stones, bricks, or wood fixed upon the parapets or battlements of bridges, or otherwise injure or deface the same ; or pull down, destroy, obliterate, or deface any milestone or post, graduated or direction post or stone, erected upon any highway ; or shall play at football or any other game on any part of the said highways, to the annoyance of any passenger or passengers ; or if any hawker, higgler, gipsy, or other person travelling shall pitch any tent, booth, stall, or stand, or encamp, upon any part of any highway ; or if any person shall make or assist in making any fire, or shall wantonly fire off any gun or pistol, or shall set fire to or wantonly let off or throw any

(a) This section applies only to footpaths or causeways by the side of roads, and not to footways in general ; and therefore a conviction under this section for driving a car-

riage and horses over an open path or road along the sea beach was held insufficient. (*Q. v. Pratt*, L. R. 3 Q. B. 64.)

squib, rocket, serpent, or other firework whatsoever, within fifty feet of the centre of such carriageway or cartway; or bait, or run for the purpose of baiting, any bull upon or near any highway; or shall lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever, upon such highway, to the injury of such highway, or to the injury, interruption, or personal danger of any person travelling thereon (a); or shall suffer any filth, dirt, lime, or other offensive matter or thing whatsoever, to run or flow into or upon any highway from any house, building, erection, lands, or premises adjacent thereto; or shall in any way wilfully obstruct the free passage of any such highway; every person so offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding 40s., over and above the damages occasioned thereby.

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

by baiting bulls;
by laying timber,
&c.;

by running of
filth;

or wilfully ob-
structing passage,
liable to penalty.

Many of these acts or omissions are nuisances at common law, and punishable accordingly.

24 & 25 Vict. c. 97. s. 25, imposes fines for the first offence and imprisonment for the second offence, in the case of persons convicted of maliciously destroying or injuring any wall, stile or gate; and by s. 33, it is felony to maliciously destroy any bridge, aqueduct or viaduct, so as to render it dangerous or impassable.

10. INJURIES AND ANNOYANCES AT COMMON LAW (b).

There is no doubt, but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people, are public nuisances at common law. (1 *Hawk.* c. 76, s. 48.)

Any contracting or narrowing of a public highway is a nuisance. (Narrowing a highway. *Brownlow v. Tomlinson*, 1 *Man. & G.* 484. See *ante*, p. 1044, as to the width of a highway.)

Ploughing up a common footpath is a public nuisance, and may be indicted accordingly. (*R. v. Cross*, 3 *Camp.* 226, *Sir Thomas Griesley's Case*, 1 *Vent.* 4; *Vin. Abr.* tit. "Nuisance.")

Carrying an unreasonable weight, with an unusual number of horses, is a nuisance. (*R. v. Egerley*, 3 *Salk.* 183; *R. v. Leach*, 6 *Mod.* 145; *Unusual weight and horses.* *Com. Dig. Chemin* (A. 3.))

To suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired, is a nuisance also at common law. (1 *Hawk.* c. 76, s. 50.)

And it seemeth clear, that it is a nuisance at common law to suffer the boughs of trees, growing near the highway, to hang over the road in such a manner as thereby to incommode the passage. (*Ib.* and 3 *Bac. Abr.* 497.)

The erection of telegraph posts without lawful authority, whereby the way is rendered less commodious than before, is a nuisance, and the fact that the posts are erected on the waste on each side of the way makes no difference. (*Reg. v. U. K. Electric Telegraph Company*, 31 *L. J. M. C.* 166.) So the laying down of an iron tramway fixed in the soil upon which to run public carriages is an indictable nuisance. (*Reg. v. Train*, 31 *L. J. M. C.* 169.) And so is the digging of trenches for laying down gas pipes without proper authority. (*Reg. v. Langton*

(a) See form of conviction, No. 35. To justify a conviction under this section it must be shown that some injury is done to the highway, or some danger or annoyance caused to passengers using it. Therefore a fire made near a road by a wheelwright for the purpose of his busi-

ness, and which was not found to have caused any such damage or annoyance, was held not to be an offence within the section. (*Stinson v. Browning*, *L. R.* 1 *C. P.* 321.)

(b) As to nuisances in general, see "Nuisance."

17. *Nuisances, &c., on.* *Gas Company*, 29 *L. J. M. C.* 118; *Ellis v. Sheffield Gas Consumers Company*, 23 *L. J. Q. B.* 42.)

And perhaps it is the better opinion, that he who hath trees next adjoining to the highway, and hanging over it to the annoyance of the people, is bound by the common law to lop the same; and it seems clear that any person may justify the lopping such trees, so far as to avoid the nuisance. (1 *Hawk. c.* 76, s. 52.)

Gates.

A gate erected in a highway is a common nuisance, because it interrupts the people in that free and open passage which they before enjoyed, and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. (See 1 *Hawk. c.* 75, ss. 9, 12; c. 76, s. 50; *Com. Dig. Chemin* (A. 3.); *R. v. Bliss*, 1 *Jurist*, 959. See form, No. 52.)

A gate erected by trustees of a turnpike road, without authority, may be removed by a magistrate, but not by others; see 3 *Geo. 4.* c. 126, s. 121. See also as to gates opening into a turnpike road, 3 *Geo. 4.* c. 126, s. 121. There is no similar clause in the 5 & 6 *Will. 4.* c. 50; but see the 81st section of that act as to the width of gates, *ante*, p. 1051.

Stiles.

The raising in height of a stile across a public footway is a nuisance. (*Bateman v. Burge*, 6 *C. & P.* 391.)

Leaving carts.

Where a waggoner, carrying on a very extensive concern, constantly suffers waggons to stand on the side of the highway on which his premises are situate an unreasonable time, he is guilty of a nuisance. (*R. v. Russell*, 6 *East*, 427. And see *R. v. Jones*, 3 *Campb.* 231.)

Coaches, &c.

And if stage coaches regularly stand in a public street of London, though for the purpose of accommodating passengers, so as to obstruct the regular track of carriages, the proprietor may be indicted. (*R. v. Cross*, 3 *Camp.* 224.)

Putting gigs, upon fair days, in the open street, may be a nuisance. (See *Jones v. Tyler*, 3 *N. & M.* 580.)

A person who has permission to place materials upon a private way along which persons are accustomed to pass by leave of the owner, is liable to an action for any injury caused by placing such materials in a manner to obstruct the road and make it dangerous. (*Corby v. Hill*, 27 *L. J. C. P.* 318.)

Laying timber.

So a timber merchant occasionally cutting logs of wood in the street, which he could not otherwise convey into his premises, will not be excused by the necessity which, in choosing the situation, he himself created. (*R. v. Jones, Id.*; 3 *Campb.* 230.) And this, though the public might have a passage through the windings and turnings; (2 *Roll. Ab.* 137;) but, removing them promptly, and not suffering them to remain in the highway an unreasonable time, will excuse him. (*Id.*; 3 *Bac. Ab. Highways* (E).)

Carriages, &c., at a rout.

It is even said, that if coaches on the occasion of a rout wait an unreasonable length of time in a public street, and obstruct the transit of her Majesty's subjects, who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance. (*R. v. Cross*, 3 *Campb.* 226. And see 1 *Russell*, 63.)

Public exhibitions, &c.

Nor is it necessary, in order to fix the responsibility on the defendant, to show that he immediately obstructed the public way, or even intended to do so; it seems to be sufficient, if the inconvenience result as an immediate consequence of any public exhibition or act; for the erection of a booth to display rope dancing, and other attractive spectacles, near a public street in London, which draws together a large concourse of people, is a nuisance liable to be punished and abated. (*Hall's case*, 1 *Ventr.* 169; 1 *Mod.* 76; *Bac. Abr. Nuisance*. And see *R. v. Moore*, 3 *B. & Adol.* 184. *Post*, "Nuisance," and "Police.")

Thus, if a party, having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do; this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, semble, that it is not necessary to show that the crowd consisted of idle, disorderly, and dissolute persons. (*Rex v. Carlile*, 6 C. & P. 637.)

But distributing hand-bills in a public way has been holden not to be illegal; (*R. v. Sarman*, 1 Burr. 516); and it may be collected, that a mere transitory obstruction, which must necessarily occur, is excusable, if all reasonable promptness be exerted in removing it.

So that the erection of a scaffolding to repair a house, the unloading a cart or waggon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful; though, if an unreasonable time were employed in the operation, they would become nuisances. (*R. v. Jones*, 3 Campb. 231; *Bac. Ab. tit. "Highways"* (E.); *R. v. Ward*, 4 Ad. & E. 405.)

In repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable; for, if the owner of a house employ his own servants, or even contract with a builder to rebuild or repair his house, and the latter erect a shed so far out into the street as to encroach unreasonably on the highway, the owner would be guilty of a nuisance. (*Bush v. Steinman*, 1 B. & P. 407.)

Lord Denman, in *R. v. Ward* (*supra*), speaking of a hoard erected for repairing a house, said, "that the hoard is placed for the safety of those possessing the right of way: it protects them from inevitable danger if it leaves them a free passage, and sends them another way if the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out subject to these occasional interruptions, which resemble the temporary acts of loading coals in keels, alluded to in *R. v. Russell*, 6 B. & C. 566.

Building a house higher than it was before, whereby the street becomes darker, is not a public nuisance because of the darkening only. (*R. v. Webb*, 1 Ld. Raym. 737.) But an ancient erection like a house is a nuisance if suffered to become ruinous and dangerous. (*Cooper v. Walker*, 31 L. J. Q. B. 212.)

An indictment will not lie for obstructing a highway by holding a fair or market, if there has been an uninterrupted custom for 20 years. (*R. v. Smith*, 4 Esp. 109.)

A person may be indicted for a nuisance to a highway where, by blasting stone in a quarry, he causes a quantity of stones to fall upon a highway adjacent thereto. (*Reg. v. Muthers*, 34 L. J. M. C. 22.)

In *Proctor v. Harris*, (4 C. & P. 37,) it was held that a publican who has a flap door in the foot pavement of the street opening into a cellar underneath his house is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving an injury by it. And *Tindal*, C. J., in summing up, said, "The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care, as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but on the other hand, it must be understood, that, as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most

17. Nuisances,
etc., on.

Distributing
handbills.

Mere temporary
obstructions.

Scaffolding.

Unloading carts.

Repairing house,
etc.

Custom to erect
hoard in London.

Darkening street.

Fair or market.

Leaving open
cellar doors.

17. *Nuisances, &c., on.* likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in owing to the negligence and carelessness of the defendant in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But, if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant."

Nuisances to public rivers (a). Obstructing the passage of a navigable river is a nuisance. (*Hale de Jure Maris*, pt. 1, c. 3, p. 9; *Hale de Portibus Maris*, part 2, c. 7; and see *R. v. Ward*, *R. v. Russell*, and other cases.)

By laying timber. It is a nuisance to lay timber in a public river, although the soil on which it is laid belongs to the party, provided it obstructs the necessary intercourse. (3 *Bac. Abr.* 686; *R. v. Smith*, 3 *Keb.* 759.)

So the placing of a floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships. (*Anon.*, *Surrey Assizes* at Kingston, 1785, cited in the notes to 1 *Hawk. P. C.*, c. 75, s. 11.)

By diverting it. To divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance. (1 *Hawk. c. 75*, s. 11; *Hind v. Mansfield*, *Noy*, 103.)

Removing ship sunk in it. But if a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable as for a nuisance for not removing it. (*R. v. Watts*, 2 *Esp.* 675.)

He is, however, bound to place a buoy over the wreck, or give some other sufficient signal of its existence; and it is not sufficient to station a watchman near the spot to point out the danger. (*Hammond v. Pearson*, 1 *Camp.* 515.)

Weirs, when a nuisance. The erection of weirs across rivers was reprobated in the earliest periods of our law (b). They were considered as public nuisances. The words of *Magna Charta* (c) (9 *H.* 3, c. 23) are, that "all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England," &c. And this was followed up by subsequent acts (d) treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. (*Weld v. Hornby*, 7 *East*, 195, *per* Lord *Ellenborough*.)

But a weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown, before the commencement of the reign of Edward I. (*Williams v. Wilcox*, 8 *Ad. & E.* 314.)

Such a grant may be inferred from evidence of its having existed before that time. (*Ib.*)

If the weir, when so first granted, obstructs the navigation on only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. (*Ib.*)

Trespass for breaking down a weir appurtenant to a fishery. Jus-

(a) See, in general, as to nuisances in public rivers, *Callis on Sewers*, *Hale de Jure Maris*. And as to malicious mischief to any navigable river or canal, &c., see tit. "*Malicious Injuries to Property*."

(b) See *Glanville*, lib. IX. c. 11; 2 *Inst.* 38.

(c) See 2 *Inst.* 38; *Chester Mill Case*, 10 *Rep.* 37 b.

(d) See 4 stat. 25 *Edw.* 3, c. 4; 45 *Edw.* 3, c. 2; 12 *Edw.* 4, c. 7; 1 *Hen.* 4, c. 12. *Callis on Sewers*, and *Williams v. Wilcox*, 8 *Ad. & E.* 314, and cases and authorities there cited.

tification, that the weir was wrongfully erected across part of a public and navigable river, the Severn, where the king's subjects had a right to navigate, and that the rest of the river was choked up, so that the defendants could not navigate without breaking down the weir. Replication, that the part where the weir stood was distinct from the channel where the right of navigation existed, and was not a public navigable river. Rejoinder, that the part was a part of the Severn, and the king's subjects had a right to navigate there when the rest was choked up, and that the rest was choked up. Surrejoinder, traversing the right:—Held, that, in support of this traverse, plaintiff might show user to raise presumption of such a grant as above, and was not bound, for the purpose of introducing such proof, to set out his right more specifically on the record. (*Williams v. Wilcox*, 8 *Ad. & E.* 314.)

Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the right of the public; and therefore, in such a case, the weir would become illegal upon the rest of the river being so choked up that there could be no passage elsewhere. (*Ib.*)

At common law, every holder of lands adjoining to a river or brook has a right to raise the banks of the river or brook upon his own lands so as to confine the flood-water within the banks, provided he does not thereby occasion injury to the lands or property of other persons; and if such right has been exercised before the passing of an act authorizing the making of a public navigable canal, the exercise of such right after the making of the canal will not be a nuisance, although it may be injurious to the canal, as the construction of the canal may be considered as having taken place, subject to the enjoyment of such rights as the landholders possessed when the act passed, except so far as the act may have restrained such rights.

Upon an indictment for a nuisance to a public canal navigation, established by act of parliament, it was found, by a special verdict, that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts: that a brook fell into the river above its point of intersection with the canal, and that in times of flood, the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed: that, except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage, of the country, which had increased the body of the water; that the defendants, occupiers of lands adjoining the river and brook, had, for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, created or heightened certain artificial banks, called fenders, on their respective properties, so as to prevent the flood-water from escaping as aforesaid, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal bank as to endanger them and obstruct the navigation: that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation. It was held by the King's Bench, that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action on the case would have lain at the suit of an individual for such diversion, and, consequently, that an indictment will lie where the act affected the public. (*R. v. Trafford*, 1 *B. & Ad.* 874.) The jury also found that the acts creating the nuisance were done by the defendants severally; and it

17. *Nuisances, &c., on.*

As to owners of lands adjoining a river having a right to raise banks to confine the flood-water.

17. *Nuisances, &c., on.*

was held, that, as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several. But the Court of Exchequer Chamber, although they agreed in the principle, that the ancient course and outlet of the flood-water had been obstructed by the wrongful raising from time to time of the fenders by the defendants, upon which the judgment of the King's Bench proceeded, held, that the special verdict ought to have found, 1st, Whether the raising fenders was an ancient and rightful usage, or whether it had been commenced since the construction of the canal. For there was no doubt that, at common law, the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction of the aqueduct and embankment might be considered as having taken place, subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the act might have restrained the exercise of such rights.—2ndly, Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course.—And, 3rdly, Whether or not the raising of the fenders to their present height had become necessary, in consequence of the construction of the aqueduct. (*Traf-ford v. Rex*, 8 Bing. 204; *venire de novo* awarded.)

Nuisances in
ports.

It seems that the law as to nuisances in rivers and ports, in principle, is the same. (*R. v. Ward*, 4 Ad. & E. 406; and see Lord Denman's remarks on this subject in this case.)

The bringing a great ship into Billingsgate dock, which, though a common dock, was common only for small ships coming with provisions to the markets in London, appears to have been considered as a nuisance, in the same manner as if a man were to use a common pack and horseway with his cart, so as to plough it up, and thereby render it less convenient to riders. (*R. v. Leach*, 6 Mod. 145; *Bac. Abr.* tit. "*Nuisance*," (A).)

Where injury
very slight, no
nuisance.

On the trial of an indictment for a nuisance, by erecting and continuing piles and planking in a harbour, and thereby obstructing it and rendering it insecure, the jury found specially that, by the defendant's works, the harbour was in some extreme cases rendered less secure; it was held, that the defendant was not responsible, criminally, for consequences so slight, uncertain, and rare, and that a verdict of not guilty must be entered. (*E. v. Tindal*, 6 Ad. & E. 143.)

Nuisance, though
act for public
benefit.

It seems that the fact of an act being productive of more public benefit than public inconvenience does not prevent it being a nuisance. (*R. v. Ward*, 4 Ad. & E. 384.) But see *R. v. Russell* (6 B. & C. 566); where, upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, Bayley, J., in substance, directed the jury to find the defendant not guilty, if his act, indicted as a nuisance, were productive of more public benefit than public inconvenience, and a rule for a new trial upon the ground of the above being a misdirection was discharged by Bayley, J., and Holroyd, J., *Tenterden*, C. J., *diss.* See in *R. v. Ward*, 4 Ad. & E. 384, and Lord Denman's remarks on this case; see also *R. v. Ld. Grosvenor*, 2 Starkie, 511.

Therefore, where, on the trial of an indictment for a nuisance in a navigable river, and common king's highway, called the harbour of C., by erecting an embankment in the waterway, the jury found that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it was held to amount to a verdict of guilty. (*R. v. Ward*, *supra*; see the

form of the indictment in this case, 4 *Ad. & E.* 408, and see *Rex v. Ward*, *Cro. Car.* 266; *Payne v. Partridge*, 1 *Salk.* 12.)

It was also held, in this case, that it was no defence to the indictment, that, although the work was in some degree a hinderance to navigation, it was advantageous, in a greater degree, to other uses of the port.

And where the defendant, being the proprietor of a colliery, made a railroad from it to a sea-port town. The railroad was 400 yards long, and was laid upon a turnpike-road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass. The defendant allowed the public to use his railroad, paying a toll; it was held, that the facility thereby given to the general traffic with the sea-port, and particularly to the conveyance of coals, &c., thither, was not such a convenience as justified the obstruction of the highway. (*R. v. Morris*, 1 *B. & Ad.* 441; see *R. v. Ward*, 4 *Ad. & E.* 394, *per Paterson, J.*)

By an act of parliament, power was given to a company to make a railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act, the company, or persons authorised by them, were empowered to use locomotive engines on the railway. The railway was made parallel with and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made in those instances to pass at a greater distance. The locomotive engine on the railway frightened the horses of persons using the highway as a carriage road. On an indictment against the company for a nuisance—Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorising the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of Parliament giving such unqualified authority. (*R. v. Pease*, 4 *B. & Ad.* 30. And see *R. v. Gregory*, 2 *N. & M.* 478; *Bouverie v. Miles*, 1 *B. & Adol.* 38 (a).)

Where act authorised by statute.

It seems to have been holden by Lord *Kenyon*, that the existence of a nuisance for a great number of years might render it legal: (*Pealce*, *N. P.* 391;) but the contrary now appears to be settled. (*Weld v. Hornby*, 7 *East*, 199; *R. v. Cross*, 3 *Campb.* 227; *Chad. v. Tilsed*, 5 *Moore*, 185.)

Existence of nuisance for a number of years does not render it legal.

In one case it was holden, that 20 years' possession of the water at a given level was not conclusive as to the right; *et per Abbott, C. J.*, "If it be admitted that this is a public navigable river, and that all his Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of 20 years would not have the effect of preventing his Majesty's subjects from using it as such." (*Vooght v. Winch*, 2 *B. & Ad.* 662.)

If the party who has been indicted for a nuisance continue the same, he may be again indicted for such continuance. (1 *Hawk*, c. 76, s. 157; 2 *Roll Abr.* 137, (B 4;) *sed vide Austin's case*, 1 *Ventr.* 183, tit. "Nuisance.")

Continuing nuisance.

11. SECURING OFFENDERS.

By 5 & 6 Will. 4, c. 50, s. 79, after reciting that offences may be committed against this act by persons whose names are unknown to the surveyor, assistant-surveyor, or district surveyor, it is enacted, that

For securing unknown offenders.

(a) It will be seen that the 5 & 6 Will. 4, c. 50, s. 70 (*ante*, p. 1050), prohibits the erection of steam-engines

within 25 yards of a highway, unless behind screens.

17. *Nuisances, &c., on.*

5 & 6 Will. 4, c. 50.

it shall be lawful for the surveyor, assistant-surveyor, or district surveyor, or any person acting under his authority, and such other person as he shall call to his assistance, or any other person witnessing the commission of the offence, without any other authority than this act, to seize and detain such unknown person who shall commit any such offence, and take him forthwith before any justice of the peace, who shall proceed and act with respect to such offence according to the provisions of this act.

See, as to the proceedings against offenders under this act, p. 1088.

12. POWER OF SURVEYOR TO REMOVE NUISANCES AND OBSTRUCTIONS.

Matters laid on or near highway, so as to be a nuisance, to be removed on notice, or, on failure, surveyor to dispose of the same by order of a justice.

By 5 & 6 Will. 4, c. 50, s. 73, if any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever shall be laid upon any highway, so as to be a nuisance, and shall not, after notice given by the surveyor, assistant-surveyor, or district surveyor, be forthwith removed, it shall and may be lawful for the surveyor, assistant-surveyor, or district surveyor, by order in writing from any one justice, to clear the said highway by removing the said stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing as aforesaid, and to dispose of the same, and to apply the proceeds arising therefrom towards the repairs of the highway within the parish in which such highway may be situate: Provided nevertheless, that if any soil, ashes, or rubbish shall be laid on any highway, and, such soil, ashes, or rubbish shall not be of sufficient value to defray the expenses of removing them, the person who laid or deposited such soil, ashes, or rubbish shall repay to the said surveyor, assistant-surveyor, or district surveyor, the money which he shall have necessarily expended for the removal thereof, which money, in case the same shall not be forthwith repaid, shall be levied as forfeitures are herein directed to be levied.

Upon an information under this section the justices have jurisdiction to decide whether the way in question is a highway or not. (*Williams v. Adams*, 2 B. & S. 312.)

As this act contains no section taking away the summary jurisdiction of justices where title to land comes into question, it becomes necessary, in every case of complaint made to them, for the justices to decide whether the *locus in quo* is a highway or not. (*Ib.*)

The above section does not make it incumbent upon the surveyor to remove nuisances; it empowers him to give notice to the parties placing them there to remove them. Again, the act imposes no obligation on him to fence places that are dangerous. (*Morgan v. Leach*, 10 M. & W. 558, *per Parke*, B.)

Therefore, where the defendants, who were magistrates, directed the plaintiff, a surveyor of highways, to remove a certain nuisance from the highway, and to fence a pit that was dangerous, and, on his neglecting to do so, convicted him in a penalty for having "wilfully neglected his duty in not removing, or causing to be removed, certain nuisances in and upon a certain highway in the said parish, &c., and not duly guarding a dangerous pit lying on the said highway;" it was held, that the conviction was not warranted by the 20th or the above section of the 5 & 6 Will. 4, c. 50, and that it could not be supported. (*Morgan v. Leach*, 10 M. & W. 558.)

The order of the justice made pursuant to this section for the removal of the nuisance is conclusive as to the fact that the *locus in quo* is a highway. (*Mould v. Williams*, 5 Q. B. 69, recognising *Brittain v. Kinnaird*, 1 B. & B. 432.)

As to the levying, &c. of such forfeitures, see ss. 101, 103, *post*, p. 1088.

As to the common law right to remove nuisances, see *post*, p. 1064.

13. POWER OF SURVEYOR TO IMPOUND CATTLE STRAYING, &c. ON
HIGHWAYS.

The 5 & 6 Will. IV. c. 50, s. 74, is repealed by 27 & 28 Vict. c. 101, s. 25, which enacts, If any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine is at any time found straying on or lying about any highway, or across any part thereof, or by the sides thereof, (except on such parts of any highway as pass over any common or waste or uninclosed ground,) the owner or owners thereof shall, for every animal so found straying or lying, be liable to a penalty not exceeding 5 shillings, to be recovered in a summary manner, together with the reasonable expense of removing such animal from the highway where it is found to the fields or stable of the owner or owners, or to the common pound (if any) of the parish where the same shall be found, or to such other place as may have been provided for the purpose: Provided always, that no owner of any such animal shall in any case pay more than the sum of 30s., to be recovered as aforesaid, over and above such reasonable expenses as aforesaid, including the usual fees and charges of the authorised keeper of the pound: Provided also, that nothing in this act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway.

Sect. 74 of 5 & 6 Will. 4, c. 50, repealed, and other provisions made as to cattle found straying, &c. on highways.

Looking at the language of this section, there can be no doubt that the intention of the legislature was that if cattle are found straying on the highway, which would imply that they were not in the charge of some one who had control over them, that should be an offence, and then, as the words lying about are also in this section, omitting the qualification without a keeper (as in 4 & 5 Will. 4, c. 50, s. 74), the meaning clearly is, that if the animals do in fact lie about the highway, although there may be a keeper with them, that should also be an offence. (*Lawrence v. King*, L. R. 3 Q. B.) Therefore where sheep were found lying about a highway, though under the control of a keeper, held that the owner was rightly convicted under 24 & 25 Vict. c. 109, s. 25, *ib.*

See, as to parties impounding cattle, &c., being obliged to provide sufficient food for them, 5 & 6 Will. 4, c. 59, ss. 4, 5, 6; and "*Distress*."

Sect. 75. In case any person shall release or attempt to release any horse, ass, sheep, swine, or other beast or cattle which shall be seized for the purpose of being impounded under the authority of this act from the pound or place where the same shall be so impounded, or in the way to or from any such pound or place, or shall pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto or with which the same shall be fastened, or shall rescue or release, or attempt to rescue or release, any distress or levy which shall be made under the authority of this act, until or before such horse, ass, sheep, swine, or other beast or cattle seized or so impounded, or such distress or levy so made shall be discharged by due course of law, every person so offending shall, upon conviction thereof before any two of his Majesty's justices of the peace, either upon confession of the party or parties offending, or upon oath of one credible witness, forfeit and pay any sum not exceeding 20l., at the discretion of the said justices, and in default thereof be committed by such justices, by warrant under their hands and seals, to the house of correction of the county wherein the said offence shall have been committed, there to be kept to hard labour for any time, at the discretion of the justices, not exceeding three calendar months. (See *Woolurych on Highways*, p. 90, n.) And see further as to pound-breach, "*Rescue*," "*Distress*." And see a clause in the Turnpike Act, 3 Geo. 4, c. 126, s. 123, *post*.

5 & 6 Will. 4, c. 50
Furnishing person
guilty of pound-
breach.

17. *Nuisances, &c., on.*

Abatement of nuisance.

14. ABATEMENT OF NUISANCES AT COMMON LAW.

Independently of any legal proceedings, it appears that any person may lawfully abate a public nuisance; at least, if it be so placed in the highway as to obstruct the passage of her Majesty's subjects. (1 *Hawk.* c. 75, s. 12. See *Earl of Lonsdale v. Nelson*, 2 *B. & C.* 302.) But though a party may remove the nuisance, yet he cannot remove the materials more than is necessary to abate the nuisance, or convert them to his own use (*Dalt.* c. 50); and so much of the thing only as causes the nuisance ought to be removed, as, if a house be built too high, only so much of it as is too high should be pulled down. (9 *Rep.* 53; *God.* 221; *R. v. Pappineau*, 2 *Str.* 686.)

And in all cases of removal of the nuisance, the party should take care to do no more damage than is actually necessary for the purposes of the removal.

As to the power of a court of equity to abate, &c., see 18 *Ves.* 211.

See further as to the abatement of nuisance, tit. "*Nuisance.*"

15. INDICTMENT FOR NUISANCES, &c. PUNISHMENT FOR, &c. (a)

Indictment, &c., for nuisances.

The party guilty of a nuisance to a highway may be indicted at common law, and this is the usual mode of proceeding. (See "*Nuisance.*")

Who may be indicted.

A party may also be indicted for the continuance of a nuisance; and this, though he has been before indicted, for every continuance of a public nuisance is in law a nuisance. (*R. v. Stead*, 1 *T. R.* 142; *Austin's case*, 1 *Ventr.* 183.)

Also it seemeth that an heir may be indicted for continuing an encroachment, or other nuisance to a highway, begun by his ancestor. (1 *Hawk.* c. 76, s. 61.)

An act of Parliament prohibited the erection or continuance of any building within ten feet of the road, and declared that the footpaths should be subject to the act, and be part of the road. It further enacted, that, if any such building should be erected or continued contrary to the act, it should be deemed a common nuisance. By another clause, two magistrates were empowered to convict the proprietor and occupier of such building, and to make an order for the removal thereof:—Held, that, notwithstanding the latter clause, the party who erected or continued a building contrary to the act might be indicted for a nuisance. (*R. v. Gregory*, 5 *B. & Adol.* 555.)

An indictment does not lie merely for not *cleaning* a highway, or for merely *diverting* it. (1 *And.* 234.)

Requisites of indictment.

In *R. v. Watts* (1 *Salk.* 357), an indictment was allowed for not repairing a house standing on a highway, ruinous and like to fall down, which the defendant occupied, and ought to repair *ratione tenuræ sue*.

As to the description of the highway in the indictment, see the rules, *post*, p. 1071, &c., as to indictments for not repairing highways, which will for the most part apply here.

It is not, it seems, necessary to state the means by which the highway was obstructed; it is sufficient to say *quod obstruxit* or *obstupavit*, without saying how. (3 *Leon* 13; *Willes*, 583; 1 *Bos. & P.* 180; *Com. Dig.*, "*Action on Case for Disturbance*," (B. 1); *Cro. Jac.* 606.)

The indictment must contain the words "to the common nuisance of all the liege subjects of our lady the now Queen," residing, passing,

(a) See, in general, as to indictments for nuisances, &c. tit. "*Nuisance*;" and *see*, as to the punishment for nuisances in navigable rivers,

and the mode of reforming such nuisances, *Callis on Sewers*; *Hale de Jure Maris*; *Williams v. Wilcox*, 8 *Ad. & E.* 314.

or using, &c., according to the facts in its conclusion (1 *Stra.* 688; *Com. Dig.* "Indictment," *G.* 6); and it is said that, if the indictment conclude, to the damage of divers subjects, it will be insufficient. (*Cro. Eliz.* 148.)

The defendant cannot make objections to the indictment till he has pleaded. (*Dalt.* c. 66.)

A party was indicted for a nuisance in stopping up the course of a river, by throwing in mud; the acts appearing permanent, the court refused the defendant a rule for the particulars of the dates of the acts in question, but granted it as to the acts themselves. (*R. v. Flower*, 7 *Dowl. P. C.* 665; and see *R. v. Curwood*, 3 *Ad. & E.* 815; and "Nuisance.")

The plea is the general issue, not guilty.

As to the evidence in general to prove a way is public, see p. 1078, &c.

As to witnesses, see *post*, p. 1087.

The punishment for a common nuisance is fine and imprisonment, at the discretion of the court in which the offender is convicted. (1 *Hawk.* c. 75, ss. 14, 15.) But no imprisonment or corporal punishment is now inflicted. The object of the prosecution is to remove the nuisance, and to that end alone the sentence is in general directed. It is therefore usual, when the nuisance is stated on the proceedings as continuing, in addition to a fine, to order the defendant, at his own costs, to abate the nuisance. (*R. v. Pappineau*, 2 *Stra.* 686; see *post*, p. 1079.)

It should seem, however, that where a building is not a nuisance in itself, but becomes so, either by its extension, or the use made of it for carrying on a noxious trade, the house itself ought not to be demolished, but only such part removed as annoys the public, or such injurious occupation discontinued. (*Id.*) And where the nuisance is not charged as still existing, but as having been offensive on a day specified, no judgment need be given to abate; because it would be absurd to adjudge that to be destroyed which does not appear to exist. (*R. v. Stead*, 8 *T. R.* 42.)

And if the court be satisfied that a nuisance indicted is already effectually abated before judgment is prayed upon the indictment, they will not, in their discretion, give judgment to abate it; and they refused to give such judgment upon an indictment for an obstruction in a public highway, which highway, after the conviction of the defendant, was regularly turned by an order of justices, and a certificate obtained, that the new way was fit for the passage of the public, and on affidavits that so much of the old way indicted as was still retained was freed from all obstruction. (*R. v. Incledon*, 13 *East*, 164.)

As to costs, see tit. "Costs."

Where a defendant applied to remove an indictment for obstructing a highway from sessions by *certiorari*, on account of the probability that difficult points of law would arise, it was held, that it was not sufficient to show in his affidavit that the obstruction complained of by the indictment consisted of buildings of great value, which had stood thirty or forty years. (*R. v. Joule*, 5 *Ad. & E.* 539.)

As to *certiorari* in general, see "*Certiorari*." The 117th sect. of the 5 & 6 Will. 4, c. 50 (reserving the powers of commissioners of sewers) does not apply to an indictment for this offence.

16. PRESENTMENT FOR NUISANCES.

It seems that a nuisance to a highway by actual obstruction may be presented in the leet, or at the sessions. As to the form of such presentment, the same rules as to indictments, *supra*, will apply. As to presentments in general, see tit. "*Presentment*," and *post*, p. 1086.

17. ACTION FOR NUISANCE.

In general, no action can be maintained for a public injury. There-

17. *Nuisances*,
&c., *on.*

Objections to,
when to be made.

Particulars of nuisance.

Plea.

Evidence.

Punishment.

Costs.

Certiorari.

Presentment
nuisances.

Action for
nuisance.

19. *Proceedings for not repairing.* fore an action does not lie for obstructing a man's passage in a highway, because he has no more damage than others of the Queen's subjects; but the party causing the obstruction must be proceeded against by indictment. (*Pain v. Partridge*, *Comb.* 180; *R. v. Saintiff*, 6 *Mod.* 255; *Pain v. Patrick*, 3 *Mod.* 289; *Cro. Eliz.* 664.)

But if a person has sustained more particular damage by the nuisance than the public in general, as if any accident occurs to him, or he be obliged to go a greater distance, and thereby put to an expense in the conveyance of his goods or otherwise, or his custom in a business he carries on be diminished by reason of the nuisance, then he may sue the party causing it. (*Rose v. Miles*, 4 *M. & Sel.* 101; *Greasley v. Codling*, 2 *Bingh.* 263; *Wilks v. Hungerford Market Company*; 2 *B. N. C.* 281.) And as to leaving open cellar doors, see *Daniels v. Potter*, 4 *C. & P.* 262; *Procter v. Harris*, 4 *C. & P.* 337.

Two things must concur to support this action,—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. (*Butterfield v. Forrester*, 11 *East*, 60, *per Lord Ellenborough*; *Marriott v. Stanley*, 1 *Scott's, N. R.* 395.)

Therefore, where, in an action to recover a compensation in damages for an injury occasioned by an obstruction in a highway, it was left to the jury to say whether or not the plaintiff was himself in any degree the cause of the injury—whether he had acted with such a want of reason and ordinary care as to disentitle him to recover, it was held that the direction was proper. (*Id.*)

See further as to actions for nuisances, *post*, tit. "Nuisance."

XVIII. Locomotives on Roads.

This matter is regulated by the 24 & 25 *Vict. c. 70*; and the 28 & 29 *Vict. c. 83*. The acts are printed under "*Turnpikes*," *post*.

XIX. Proceedings for not Repairing Highways.

Herein of—

1. *Proceedings before Justices where the Obligation to repair is not disputed*, p. 1066.
2. *Proceedings by Indictment where the Obligation to repair is disputed, and the subsequent Proceedings thereon*, p. 1070.
3. *Information in Queen's Bench for not repairing*, p. 1085.
4. *Mandamus for not repairing*, p. 1085.
5. *Entering and repairing*, p. 1086.
6. *Presentments for non-repair abolished*, p. 1086.

1. MODE OF PROCEEDING BEFORE JUSTICES WHERE OBLIGATION TO REPAIR IS NOT DISPUTED.

5 & 6 *Will. 4, c. 50*.
Mode of proceeding before justices if highway is out of repair, and obligation to repair is not disputed.

By 5 & 6 *Will. 4, c. 50, s. 94*, From and after the commencement of this act, if any highway is out of repair or is not well and sufficiently repaired and amended, and information (a) thereof, on the oath of one credible witness, is given to any justice of the peace, it shall and may be lawful for such justice, and he is hereby authorised and required, to issue a summons (b) requiring the surveyor of the parish,

(a) See form, No. 39, *post*.

(b) See form, No. 28, *post*.

or other person, or body politic or corporate chargeable with such repairs, to appear before the justices at some special sessions for the highways in the said summons mentioned, to be held within the division in which the said highway may be situate (a); and the said justices shall either appoint some competent person to view the same, and report thereon to the justices in special sessions assembled, on a certain day and place to be then and there fixed, at which the said surveyor of the highways or other party as aforesaid shall be directed to attend, or the said justices shall fix a day whereon they or any two of them shall attend to view the said highway; and if to the justices at such special sessions on the day and at the place so fixed as aforesaid, it shall appear either on the report (b) of the said person so appointed by them to view, or on the view of such justices, that the said highway is not in a state of thorough and effectual repair, they, the said justices, at such last-mentioned special sessions shall convict the said surveyor or other party liable to the repair of the said highway in any penalty not exceeding 5*l.* (c), and shall make an order on the said surveyor, or other person, or bodies politic or corporate liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same; and in default of such repairs being effectually made within the time so limited, the said surveyor, or such other person, or body politic or corporate as aforesaid, shall forfeit and pay to some person to be named and appointed in a second order a sum of money to be therein stated, and which shall be equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, which money shall be recoverable in the same manner as any forfeiture is recoverable under this act (see ss. 101, 103, *post*, p. 1088), and such money, when recovered, shall be applied to the repair of such highway; and in case more parties than one are bound to repair any such highway, the said justices shall direct in their said order what proportion shall be paid by each of the said parties: Provided, (d) that if the said highway so

19. *Proceedings for not repairing.*

5 & 6 Will. 4, c. 50.

Penalty.

Forfeiture.

If highway a turnpike road.

(a) An order of the special sessions directing an indictment for non-repair must show on the face of it that the special session is held within the special session division in which the highway is situate, and if this be omitted, any order of quarter sessions for costs is void. (*Reg. v. Martin*, 2 Q. B. 1037.)

(b) See *infra*.

(c) In *E. v. Justices of Wilts* (8 Doubl. 717), *Coleridge, J.*, in reference to this penalty said,—"It is said that this penalty, if inflicted, would come out of the highway rate. But I do not think that sect. 96 (see *post*, p. 1080) bears that construction. It appears to me that the penalty was intended, by sect. 94, to fall upon the surveyor, as a punishment for his neglect in not repairing the highway. Very extraordinary consequences would be the result if the penalty could come out of the highway rate. I only throw out this by way of remark, and not as a decision upon that point."

(d) Under this proviso a single

justice has no power to summon a surveyor or other officer of a turnpike road to appear at a special sessions for highways; nor have justices at such special sessions any authority to make an order for repair if the funds are insufficient, nor without giving such officer an opportunity of showing the state of the funds. (*Reg. v. Justices of St. Albans*, 22 L. J. M. C. 142.)

Where a local act provided that the moneys obtained by virtue of the act should be applied in "keeping down the interest" of the principal monies borrowed on the credit of the act, and in repairing the road, and lastly in repaying the principal money, the court held that the words "keeping down the interest" meant paying the annual interest as it accrued, and did not include paying arrears, which the act left to be provided for in the same way as the principal; and, therefore, that the payment of interest was lawful though the road was out of repair, but that payment of arrears of in-

19. *Proceedings for not repairing.* out of repair is a part of the turnpike road, the said justices shall summon the treasurer, or surveyor, or other officer of such turnpike road, and the order herein directed to be made shall be made on such treasurer, or surveyor, or other officer as aforesaid, and the money therein stated shall be recoverable as aforesaid; provided, nevertheless, that the said justices shall not have power to make such order as aforesaid in any case where the duty or obligation of repairing the said highway comes in question.

Justices cannot interfere where obligation to repair comes in question.

Proceedings by indictment.

In an order made by magistrates at special sessions under s. 94, for the indictment of a highway, it should distinctly appear that such highway is within the division for which such special sessions are held, and if that do not appear, any order for costs, under s. 95, would be void. (*R. v. Martin*, 2 Q. B. 1037; *R. v. Hickling*, 15 L. J. 23, M. C.) The road must also be proved affirmatively at the trial to be a highway (*R. v. Down Holland*, 15 L. J. 25, M. C.); nor can a certificate for costs be given after an acquittal upon the ground that it is not the highway set out in the order of justices (*R. v. Fifehead*, 3 Cox's C. C. 59); *R. v. Heanor* (13 L. J. 144, M. C.), is not to be regarded as an authority (see *R. v. Heanor*, 14 L. J. 38, M. C.). The order for costs should state the amount, and out of what fund they are to be paid (*R. v. Watford*, 4 D. & L. 593), and consequently, the amount should be ascertained pending the sessions, or the commission of the judge who tried the cause. (See *R. v. Clark*, 5 Q. B. 887.)

A judge at nisi prius, after the indictment has been removed by *certiorari*, may make the order for costs (*R. v. Watford*, 4 D. & L. 493); but it has been held that if the defendants plead guilty the indictment is not tried, and the order cannot be made. (*R. v. Vowchurch*, 2 C. & K. 393, per *Vanghan* and *Williams*, Js.) The allegation in an indictment that a road was an immemorial highway is immaterial, because the parish is liable the instant it becomes a highway. (*R. v. Turweston*, 20 L. J. 46, M. C.)

Criminal information against a parish for non-repair.

Where a grand jury had ignored a bill of indictment against a parish for non-repair of a highway, some of the jury being landowners in the parish, and taking part in the discussion as to whether the bill should be found, the court granted a criminal information against the inhabitants of the parish for the non-repair of the highway. (*Reg. v. Inhabitants of Upton St. Leonards*, 16 L. J. 84, M. C.)

When enactment applies.

This enactment applies to cases where the road is not only in a state of non-repair, but where there has been a neglect in causing the non-repair. (*R. v. Wilts*, 8 Dowl. 717.)

Where upon a summons for non-repair against the surveyor of highways, at the hearing it appeared that the highway in question was a turnpike-road, the court held that justices in special sessions were not bound to convict the surveyor of the highways, though the complainant offered to prove that the trust had no funds, and that he appeared for the trustees. (*Reg. v. Trafford*, 5 E. & B. 967.)

If a turnpike-road be out of repair, the right person to be summoned under this section in the first instance is the treasurer, surveyor, or other officer of the turnpike-road, and no order can be made upon the parish surveyor for the repair of a turnpike-road unless it be shown to the justices that the funds of the trust are not sufficient. (*In re Surveyor of Gorton*, 25 L. J. M. C. 70.)

Magistrates not bound by report of viewer.

Where an information is laid under this section, that a highway is out of repair, and the magistrates, pursuant to that section, appoint a

terest was illegal when the road was out of repair. Held, also, that the order on the trustees ought not to be made unless they had funds in hand

applicable to the purposes of such order. (*R. v. Hutchinson*, 4 E. & B. 200.)

viewer, who reports it out of repair, the magistrates at the special sessions are not bound by that report, but may exercise their discretion, whether they will convict the surveyor or not. (*Id.*)

Where one of 3 defendants, who were magistrates, having received information on oath that a certain turnpike-road was out of repair, summoned the surveyor of the road, under the above section, to appear at a special sessions; at that sessions the 2 defendants ordered A. B. to view the road, and report thereon to them at another special sessions. A. B. having reported at the latter sessions, when the plaintiff was present, that the road was out of repair, the defendants ordered the surveyor to repair it within 6 weeks, and at the same time ordered him, under stat. 18 Geo. 3, c. 19, s. 1, to pay 2*l.* 3*s.* as costs. The plaintiff having refused to pay this sum, and his goods having been taken as a distress by warrant from the defendants, he replevied them, and brought the present action of replevin. It was held, first, that a single magistrate had no authority under the above 94th sect. to summon the surveyor; 2ndly, that the defendants could not inflict costs under the stat. 19 Geo. 3, c. 19, s. 1 (see *post*, tit. "Costs"); 3rdly, that the defendants were not justified in inflicting costs upon the plaintiff, since, not having disobeyed the order of justices, he had not committed any offence; and, 4thly, that an action of replevin would lie against the defendants. (*George v. Chambers*, 11 *M. & W.* 149.) And *per Abinger*, C. B., in this case, after stating the mode to be adopted under this section against the surveyors of highways, &c.—"In the case of a surveyor of turnpikes, a different mode is to be adopted. It may become necessary for the justices to examine the state of the turnpike funds. A former statute (3 Geo. 4, c. 126, s. 109) enables them to transfer the statute duty from turnpike roads to other highways, if it can be conveniently dispensed with, without endangering the securities for the money advanced on the tolls. In such a case, it would be proper for them to order the surveyors of turnpikes to repair the roads. If, therefore, the surveyor, when summoned, declares the road to be a turnpike-road, it may become necessary for the justices to examine the state of the funds; and if, after having done so, they make an order on him to repair the road, and he disobeys it, then, and not till then, does he become liable to the payment of costs." And *per Parke*, B., in the same case, speaking of the power of the defendants to inflict the costs,—“In the case of a turnpike surveyor, they should give him an opportunity of showing that he has no funds. But here the defendants have not adjudicated upon the matter, for they have not found that the plaintiff was guilty of any misconduct; they have not found that he was bound to repair the road, on the ground of his being in possession of funds for that purpose. The circumstance which is wanting to give them jurisdiction is, that they should have called the surveyor before them, and should have adjudicated that the road was out of repair through his default. Here it appears merely that they made an order, but it is not stated that that order was disobeyed, and therefore no breach of duty appears to have been committed by the plaintiff.” And *per Alderson*, B.—“The parties *primâ facie* liable are, therefore, the persons to be summoned in the first instance. If the road is reported to be out of repair, the justices are to convict the surveyor in a penalty not exceeding 5*l.*; and after that begins their remedial power of directing the road to be repaired. It is at this stage of the proceedings that the surveyor of turnpikes is to be summoned; and if he is adjudged to be liable, he is to be ordered to repair within a certain time, and if guilty of default, he is to forfeit a sum of money equal to the amount required for repairs. The justices may summon the trustees, or others acting under the general turnpike acts, the funds in the possession of the latter being, in fact, a collateral security for the repair of the roads. So, if there be a conviction against the inhabitants, the fine for the repair of the

19. *Proceedings for not repairing.*

Mode of proceeding when highway a turnpike road.

One magistrate no authority to summon surveyor.

Costs.

Examining state of turnpike funds.

Parties *primâ facie* liable first to be summoned.

When surveyor of turnpikes to be summoned.

Forfeiture by him.

19. *Proceedings for not re-pairing.* Magistrates' discretionary power. Costs. Road may be apportioned between them and the trustees, care being taken that the interests of the creditors of the principal trust are not affected. In the case, therefore, of a turnpike surveyor, the magistrates have a discretionary power of considering what course they are to take. If, after investigating the state of the funds, they find the debts of the trust to be inconsiderable, they may direct the surveyor to repair the road within a certain time, and in default thereof may summon him, and impose a forfeiture upon him, which, together with costs, he will then be liable to pay for disobeying the order of justices. But here the plaintiff was not bound to pay costs, as the time for repairing the road had not elapsed, and, therefore, the costs were inflicted before any offence was committed."

Costs. As to the costs under this mode of proceeding, see s. 97, *post*, p. 1087.

Penalty. As to the levying and application of the penalty or forfeiture, see the 101st and 103rd sections, *post*, p. 1088; and see *George v. Chambers*, *ante*, p. 1069.

2. MODE OF PROCEEDING BY INDICTMENT, WHERE OBLIGATION TO REPAIR IS DISPUTED, AND THE SUBSEQUENT PROCEEDINGS THEREON.

Mode of proceeding if obligation to repair is disputed. Indictment and witnesses. Costs. Certiorari (*d*). By 5 & 6 Will. 4, c. 50, s. 95, if, on the hearing of any such summons (s. 94, *ante*, p. 1066) respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required to direct (*a*) a bill of indictment to be preferred, and the necessary witness in support thereof to be subpoenaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order for suffering and permitting the said highway to be out of repair; and the costs (*b*) of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate (*c*) made and levied in pursuance of this act in the parish in which such highway shall be situate: Provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment, by certiorari or otherwise, into his Majesty's Court of King's Bench.

An indictment against a parish preferred and found at the assizes pursuant to an order of justices under s. 95, may, notwithstanding s. 107, be removed by certiorari. (*Reg. v. Sanders*, 3 E. & B. 540.)

In an order made by magistrates at special sessions under 5 & 6 Will. 4, c. 50, ss. 94, 95, for the indictment of a highway, it should distinctly appear that such highway is within the division for which such special sessions are held, and if that do not appear the subsequent proceedings at the quarter sessions are void, though it may appear on

(*a*) As to form of order, see *R. v. Martin*, 8 Jurist, 36; and see form, *post*, No. 40.

(*b*) See *post*, p. 1081.

(*c*) These words refer not only to rates made or levied at time of making the order, but to the highway rate in general, and if there be not sufficient funds in the hands of the surveyor they must make a rate for that object.

The order binds the surveyor in office and all his successors until the costs are paid. These costs cannot be levied by distress, but the court will grant a mandamus to compel the levying and payment of them. (*R. v. Eyton*, 3 E. & B. 390; *Reg. v. Tryd-dyn*, 23 L. J. M. C. 45.)

(*d*) See tit. "Certiorari," and *post*, p. 1091.

the face of them that the highway was within their jurisdiction. (*Reg. 19. Proceedings v. Martin*, 13 *L. J. M. C.* 45; *Reg. v. Hettesbury*, 8 *L. T. N. S.* 315.)

for not repairing.

Where, under the direction of justices, pursuant to s. 95 of 5 & 6 Will. 4, c. 50, a bill of indictment is preferred for non-repair of a road, the judge before whom the indictment is tried is bound to order payment of the costs of the prosecution, although the defendants have been acquitted, on the ground that the road in question is not a highway. (*Reg. v. The Inhabitants of Heanor*, 13 *L. J. M. C.* 144.)

It would seem that the indictment at common law and informations for non-repair are not abolished by this enactment; but this may be questionable.

Indictment at common law for non-repair not taken away.

The justices are not to direct an indictment as a matter of course whenever the liability to repair is denied, they ought to have some evidence of the fact that the *locus in quo* is a highway (*Reg. v. Asker-ton*, 13 *W. R. Q. B.* 339), and hear evidence upon the question, highway or no highway, upon which their jurisdiction depends. (*Reg. v. Johnson*, 34 *L. J. M. C.* 85.) It is only their duty to direct an indictment under this section, when they find that the road in question is a highway that is out of repair, and that the liability to repair is disputed, but not where a jury have decided that the road in question is not a highway. (*Bartlett, ex parte*, 30 *L. J. M. C.* 65.)

If the liability to repair is denied by the parish, the special sessions cannot inquire into the matter at all, but are bound to direct an indictment against the inhabitants of the parish. (*Reg. v. Arnould and others*, 27 *L. J. M. C.* 92.) But the court will not by *mandamus* compel justices to order a 2nd indictment, where upon a previous indictment preferred under this section, a verdict of not guilty was returned. (*Bennett, ex parte*, 6 *Jur. N. S.* 1196.)

Indictment against a parish.—The indictment against a parish for the neglect of their common-law liability to repair must show that the road in question is a highway, that it is situate within the parish, and that it is out of repair.

Form of indictment against parish.

As to the description of the highway, though it has been usual to state, that, "from time whereof the memory of man is not to the contrary," or "from time immemorial, there was and yet is a certain common and ancient King's highway," this averment is unnecessary, and the term "highway" will suffice. (*Aspinal v. Brown*, 3 *T. R.* 265; *Thrower's case*, 1 *Vent.* 208.)

Description of highway.

Proof that one part of a highway is an immemorial way, and the other part recently dedicated, is not sufficient to sustain an indictment describing the highway as an immemorial one. (*R. v. Downshire*, 4 *Ad. & E.* 232.)

Nor is an indictment for the non-repair of a highway, describing the way as immemorial, supported by proof of a highway extinguished as such 60 years before by an inclosure act, but since used by the public, and repaired by the district charged. (*Reg. v. Westmark (Tithing)*, 2 *M. & Rob.* 305—*Maule, J.*)

If the highway be public only at particular times, the same must be described accordingly. (*R. v. Buckingham, Marquis of*, 4 *Campb.* 189; *ante*, p. 982.)

An indictment for a nuisance to a horseway, without saying it is a highway, is bad. (1 *Hawk. c.* 76, s. 89.)

An averment that the *locus in quo* was a common and public highway for, &c., to pass along at pleasure, paying a certain toll, is not inconsistent or contradictory, particularly if not said to be immemorial; for it may be a highway created by Act of Parliament. (*Sutcliffe v. Greenwood*, 8 *Price*, 535.)

It is not requisite to state whether the highway is for the use of carriages, horses, or foot passengers: if it be laid to be a common way.

Description of way.

19. *Proceedings for not repairing.*

highway, the rest will be intended. (*R. v. Hatfield, Inhabitants of, 2 Saund. 158, n. (8)*). But as so general a description would be improper, if the road be not a highway for all purposes, it is certainly prudent to insert the more particular description. (*Allen v. Ormond, 8 East, 4.*) An indictment stating the highway to be for all subjects, with their horses, coaches, carts, and carriages, is supported in evidence, though it is proved that carts only of a particular description, and loaded in a particular manner, could pass along the way. But it would be otherwise if the indictment stated the way to have been for all carts. (*R. v. Lyon, 1 R. & M. 151.*)

And if the indictment state it to be a carriage way, and the evidence show an user by persons on foot and on horseback only (*R. v. St. Weonard's, 5 Car. & P. 579*), or if the indictment state it to be a pack and prime way, and the evidence prove it to be a carriage way (*R. v. St. Weonard's, 6 Car. & P. 582*), the variance will be fatal.

Of termini of highway.

It is not necessary to state the *termini* of the highway, for highways have no boundaries but the sea. (2 *Sess. Cas.* 219; *Rouse v. Bardin, 1 Hen. Bl. 351*; 2 *Saund. 158, 693, n. (6)*; *R. v. Haddock, Andr. 145*; *R. v. St. Weonard's, 6 C. & P. 582.*)

But if the *termini* be stated, they must be proved, and care must be taken that the description is so framed as neither to exclude the parish liable, nor to seem repugnant to itself; for if the highway be described as between 2 places, both of them are necessarily excluded. (2 *Saund. 158, n. (6)*; *R. v. Fisher, 8 Car. & P. 612.*) The words *from* and *unto* seem to have both of them an exclusive as well as inclusive meaning. (See *R. v. Knight, 7 B. & C. 413*; 2 *Roll. Abr. 81*; 1 *Leach, 528*; *Hammond v. Brewer, 1 Burr. 376.*) In *R. v. Knight*, it was alleged, that certain rubbish was laid on a culvert in the parish of Studley, in a highway leading from Studley to, &c. This was held a sufficient allegation that the highway was in the parish of Studley; and Lord *Tenterden* added, that, at present, he was not satisfied with *R. v. Gamlingay (3 T. R. 513)*; and *Bayley, J.*, said, "from Studley" imports, *primâ facie*, from a vill in that parish. (*Ib.*)

But in *R. v. Botfield (1 Car. & M. 151)*, the indictment described the way as "leading from the township of D. unto the town of C.;" and *Coleridge, J.*, held, that the *termini* D. and C. were excluded. (And see *R. v. Upton-on-Severn, 6 C. & P. 133*; *R. v. Fisher, supra.*)

Where the indictment described the highway as leading from D. to C., and from C. to R., the proof was, a person going from D. to R. turned off before he got to C.: this was held a variance, for the indictment imported that the road led directly from D. to R. through C. (*R. v. Great Canfield, 6 Esp. 136.*)

But an indictment for obstruction of a public way, describing it as from A. towards and unto B., is satisfied by proof of a public way leading from A. to B., though turning backwards between A. and B. at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated. (*R. v. Marchioness of Downshire, 4 Ad. & E. 232.*) And *per Patteson, J.*—"If, as in *R. v. Great Canfield*, the description could have been satisfied only by going to a certain point, and then returning back by the same route, it would have been a different case: but here you go along an ancient highway, and make an angle backwards, but do not retrace any part."

Indictment should show that highway is in parish indicted.

In an indictment against a parish for the neglect of their common-law liability to repair a highway, it must be expressly shown that the highway lies within the parish; if not, judgment against the parish may be reversed. (See *R. v. Hertford, Cowp. 111*; *R. v. Machynlleth, 2 B. & C. 166*; *R. v. Upton, 6 C. & P. 133*; *R. v. Bishop Auckland, 1 A. & E. 744.*)

And this is the case though the part which is out of repair is expressly stated to be in the parish indicted, if such part be represented as part of the road before described, which appears not to be in the parish. (*R. v. Gamlingay*, 3 T. R. 513.) Thus, where an indictment against the parish of G. stated that there was a highway leading from the parish of H. towards and unto the parish of G., and that a certain part of the said highway, situate in the said parish of G., was out of repair, it was moved in arrest of judgment, that no part of the road as described lay in G.; and the court held the objection fatal. (*Ib.*)

An indictment charged that defendant, at the township of W., on a highway there leading from a highway leading from the village of W. towards C., to another highway leading from the village of W. towards L., by a wall there extending into the said highway by him erected, had encroached, &c.; it was held that the indictment was not uncertain, and that "there" and "said" could be referred only to the highway first mentioned. (*R. v. Wright*, 1 A. & E. 434. And see *R. v. Countesthorpe*, 2 B. & Ad. 487.)

Where a road lay in two parishes, and no division and allotment had been made, under the 34 Geo. 3, c. 64, it was held, that an indictment against one parish for not repairing one side of the road ought to have stated, that the parish was liable to repair *ad medium filum viæ*. (*R. v. St. Pancras*, Peake, N. P. 219; 6 Wentw. 409.)

The indictment must expressly show that the way is out of repair; and an allegation that it is narrow and muddy will not suffice. (*Reg. v. Stretford, Inhabitants of*, 2 Ld. Raym. 1169. See *Andr.* 234.)

It has been considered necessary to state the extent of the defective repair, by showing how many feet in length and in breadth of the highway are out of repair. (*Cro. Jac.* 324; 2 Roll. Abr. 80, 81; *R. v. All Saints and St. Mary's, Inhabitants of*, Rep. t. Hardw. 105; *R. v. Hatfield, Inhabitants of*, Id. 316; 1 Hawk. c. 76, s. 88, acc.; *R. v. Brooks, Say*, 167; *R. v. East Lidford, Inhabitants of*, Id. 301; *R. v. Smith*, 98, cont.) But as the reason assigned for its insertion is, that the court may be able to judge with certainty of the fine which they ought to impose, and as they do not at present estimate the sentence from the formal statement on the record, it seems to be the better opinion that it might be omitted (2 Saund. 158, n. (7)); though it is as well to introduce it, and the allegation need not be proved precisely as alleged.

On an indictment for non-repair of a highway in the ordinary form, a parish cannot be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged way used to pass. (*R. v. Paul, Inhabitants of*, 2 M. & Rob. 308. See *R. v. Bamber, post*, p. 1075.)

Indictment against a Township or Class of Persons, not of common right bound to repair, or against an Individual.—In such indictment, besides describing the highway as above pointed out, the mode in which the defendant became liable must be stated. (*R. v. Great Broughton, Inhabitants of*, 5 Burr. 2700; 2 Saund. 158, n. (9); and see *R. v. Penderryn*, 2 T. R. 513; *R. v. Bishop Auckland*, 1 A. & E. 744; *R. v. Clifton*, 5 T. R. 498.)

And it seems that the consideration for the liability to repair must be stated in all cases where the indictment is against an individual, or against another township or parish than that in which the road is situate; stating a prescription alone will not be sufficient; except in the case of a corporation, sole or aggregate, who may be bound to repair by prescription or usage, without consideration. (*R. v. St. Giles*, 5 M. & Sel. 260.)

Where an indictment charged that the inhabitants of the townships

19. *Proceedings for not repairing.*

Highway in two parishes.

Indictment must show that way is out of repair.

Indictment for not rebuilding a sea-wall.

Form of indictment against a township or an individual, &c.

19. *Proceedings for not repairing.* of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland, and no consideration was laid; the indictment was held bad, in arrest of judgment, as not showing that the highway was within the defendants' district. (*R. v. Bishop Auckland*, 1 A. & E. 749.)

If the inhabitants of a division or part of a parish are liable to the repair of roads within it, by reason of their having immemorially done so (a), the indictment should show that they have from time immemorial repaired; it is not enough to state, that from time immemorial they ought to repair. And unless the division be charged with the repair of *all* roads, it seems a consideration for the repair should be stated. (*R. v. Ecclesfield*, 1 B. & Ald. 348; and see *R. v. Great Broughton*, 5 Burr. 2700.)

An indictment against a township for the non-repair of a road, charged the township with a liability, by custom, to repair all common and public highways within it:—Held, after verdict for the Crown, that the custom so laid might exist; and that it need not be confined to highway, “*which, but for such custom, would be repairable by the parish.*” (*Rex v. Hedge*, 2 Q. B. 128.) And *per Cur.*—“Undoubtedly these words have of late years been, uniformly introduced, but they are not necessary; where they are introduced they put the township, *prima facie*, in the same situation as a parish; and, if the defendants mean to assert that any individuals are liable to repair the road in question *ratione tenuræ*, or otherwise (if it can be), they must plead that matter specially; but where the words are omitted, and the defendants plead not guilty, it becomes incumbent on the prosecutor to prove that the township is liable to repair all roads within it, which may be if there be none repairable by individuals; but, if the defendants can show that there are any so repairable, they will negative the custom as being laid too largely. It is a question of evidence, and not of pleading; and, in truth, the words in question were introduced within living memory for the very purpose of avoiding a failure which frequently happened by reason of the custom laid being larger than the evidence warranted. Nevertheless, the custom may be as laid in the present indictment, if no roads in the township are repairable by individuals other than the inhabitants at large.

Three townships may be indicted together.

Three townships may be charged conjointly in an indictment for the non-repair of a highway. (*R. v. Bishop Auckland*, 1 A. & E. 749.)

Indictment of extra-parochial hamlet.

Against individual.

As to the mode of stating the liability of an extra-parochial hamlet, see *R. v. Inhabitants of Kingsmoor* (2 B. & C. 193).

It seems sufficient to state the liability of an individual *ratione tenuræ terræ*, without adding *sue*, because the court will intend the tenure to be such as will make the defendant chargeable. (2 Saund. 158, n. (9); *R. v. Fanshaw*, 1 Vent. 331; *R. v. Corrock*, 1 Stra. 187.)

But the terms *ratione tenuræ* should be adhered to, and no others substituted in their room: stating the liability to be by reason of ownership and proprietorship has been held insufficient to excuse the omission. (*R. v. Kerrison*, 1 M. & Sel. 435; 3 M. & Sel. 526; *Styles*, 400; 2 Saund. 158, 5th ed.)

If an individual be bound to amend a road by reason of holding certain estates in fee-simple, it is sufficient to aver, that he is liable by reason of the tenure of his lands, without adding, “as he and all

(a) See *ante*, p. 996, when a township or part of a parish is liable to the repair of roads.

those who held the said lands for the time being, from time whereof the memory of man is not to the contrary, were used to do ;” for the prescription is necessarily implied in the estate of inheritance which he possesses. (*Co. Ent.* 358; 1 *Hawk.* c. 76, s. 8 (a).) The indictment must set forth where those lands lie. (2 *Hale*, 181.) But where the duty arises from inhabitation alone, it is necessary to state the usage. (*Keilw.* 52; 2 *Saund.* 158, n. (9).) See *ante*, p. 999, as to the liability to repair *ratione tenuræ*.

19. *Proceedings for not repairing.*

An indictment for the non-repair of a highway in parish A., alleging the liability by reason of the tenure of lands in A., is not supported by proof of a liability to repair a way extending through A. and other parishes, by reason of the tenure of a farm made up of lands in A. and the other parishes. (*R. v. Mizen*, 2 *M. & Rob.* 382.)

Where, on an indictment for the non-repair of a highway, *ratione tenuræ*, the jury found specially that the original way adjoined the sea, which had encroached upon and carried away a portion of the land over which the highway went, and part of the lands in respect of the tenure of which the liability to repair the way attached, and that the defendant had from time to time appropriated other portions of his land in lieu of such parts as had been washed away; and that, shortly before the period mentioned in the indictment, the sea had made another encroachment, and swept away a large portion of the road altogether, and had left the rest so narrow on the brow of a cliff, as to be impassable:—Held, that this finding did not warrant a judgment for the crown. (*R. v. Bamber*, 13 *Law J., M. C.* 13.)

For not repairing way destroyed by encroachment of sea.

Appearance by a Corporation aggregate.—A corporation aggregate, if indicted in the court of Queen’s Bench, can appear by attorney; but if they are indicted at the assizes, semble, that they cannot appear there by attorney, but should apply for a writ of certiorari, and appear by attorney in the court of Queen’s Bench. (*R. v. Birmingham and Gloucester Railway Company*, 9 *Car. & P.* 469.)

Appearance by a corporation aggregate.

Particulars of Ways out of Repair may be obtained.—If the indictment be so general that it does not convey sufficient information to the defendant to enable him to prepare his defence, the court will order the prosecutor to give the defendant a particular of the several acts of nuisance he intends to prove. (See *R. v. Curwood*, 3 *A. & E.* 815; *ante*, p. 1064, and “*Nuisance*.”) So, where the indictment describes the highways generally, a particular of them may in some cases be obtained. (*R. v. Marquis of Downshire*, 4 *Ad. & E.* 698 (b).)

Particulars of ways out of repair, &c., may be obtained.

Plea in either of the above Cases.—On an indictment against a parish for the non-repair of a highway, under the plea of a general issue, not guilty, the parish may show that it is in repair, or that it is not a highway, or that it does not lie within the parish, or that it is misdescribed; but they cannot show, under such plea, that other particular persons are liable; and in order to let them in to do this, they must plead specially, showing how such persons are liable. (See 2 *Saund.*

Plea to indictment against parish for neglect of their common law liability to repair. When special plea requisite.

(a) See *Rider v. Smith*, (3 *T. R.* 766,) where it was determined, that, in an action on the case for not repairing a private way leading through the defendant’s close, it was sufficient to allege that the defendant, by reason of his possession of the said close called

&c., and of two closes of land, with the appurtenances, contiguous and next adjoining thereto, is bound to repair the said way.

(b) See form of order for particulars, *post*, No. 43.

19. *Proceedings for not repairing.* 151 *b. in notis*; *Id.* 259, n. (10); *R. v. Norwich*, 1 *Str.* 181; *R. v. St. Andrew's*, 1 *Mod.* 112; *Anon.* 1 *Ventr.* 256; *R. v. St. Giles, Cambridge*, 5 *M. & S.* 260; 1 *Hawk. c.* 76, s. 9; *R. v. Eastington*, 5 *A. & E.* 765; *R. v. Heage, Inhabitants of, ante*, p. 1074.)

And care should be taken that they do so plead; for if judgment be given against the parish, whether after verdict upon not guilty, or, it seems, by default, the judgment will be conclusive evidence of the liability of the parish to repair, unless fraud can be shown, or the like. (*Post*, p. 1078.) And in one case (*R. v. The Justices of Lancashire*, 12 *East*, 369), Lord *Ellenborough*, C. J., said, "When it was known that the roads were repairable separately by the different districts of the parish, it was a fraud, in those who undertook to defend the parish against the indictment, not to have put in a special plea to that purpose."

When not.

This rule, however, requiring a special plea, does not apply where the duty is transferred by a public act of Parliament, of which all are supposed to take cognizance. (*R. v. St. George's*, 3 *Campb.* 222. See *R. v. Justices of Sheffield*, 2 *T. R.* 106.)

Form of plea (a).

It is necessary, in all cases where the parish in which the road is situate throws the liability to repair upon an individual or upon another parish, &c., to state in the plea the consideration for such liability; merely stating a prescription will not be sufficient, except in the case of a corporation sole or aggregate, who may be bound by a prescription or usage, without consideration (*R. v. St. Giles*, 5 *M. & Sel.* 260); and except also, where the liability is thrown upon a district or township in which the road is situate, there an immemorial custom for the district to repair all the roads within it (*b*) may be pleaded, without expressly stating any consideration for it, for the consideration appears sufficiently upon the face of it. (*R. v. Ecclesfield*, 1 *B. & Ald.* 348; and *R. v. Inhabitants of W. R. of Yorkshire*, 4 *B. & Ald.* 623; *vide ante*, pp. 1073, 1074.)

When the indictment alleges an immemorial liability on the defendants to repair, but does not state that they ever have repaired, the court will allow the defendants to demur, with liberty to plead over if they fail upon the demurrer. (*Reg. v. Tryddyn*, 21 *L. J. M. C.* 188.)

Where, to an indictment alleging that a public highway within a parish was out of repair, and that the parish ought to repair it, the defendants pleaded that the highway lay in a township within the parish; that the inhabitants of the township had been accustomed, and ought to repair all public highways within it, *which otherwise would be repairable by the parish at large*; that the parishioners never had repaired the said highway; and that by reason of the premises, the township ought to repair, and the parish ought not to be charged;

(a) See form of plea of general issue by parish, *post*, No. 44—of plea that a particular division of the parish is bound to repair, *post*, No. 45—of plea that others, *ratione tenuræ*, are bound to repair, *post*, No. 47.

(b) To an indictment against a parish for non-repair of a highway, the plea was, that the parish consisted of five townships, each of which, from time whereof, &c., had repaired all the highways within their own respective township, which would have been otherwise repairable by the parish at large; that the highway in question was in the township of A.,

which ought to have repaired the same. The replication denied the custom. The highway in question, which was in the township of A., was a new road, made in 1804, and there was no direct evidence of any highway in A. prior to that time, nor was any repair shown by A., except upon that road. It was proved that the four other townships had separately repaired their own highways:—*Held*, that it was not necessary, in support of the plea, to prove affirmatively the existence of any ancient highway in the township of A. (*Reg. v. Barnolds-wick*, 12 *L. J. M. C.* 44.—*Q. B.*)

to which the prosecutors replied, traversing the custom for the township to repair all public highways within it which would otherwise, &c., and there was a verdict for the defendants; the court arrested the judgment, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party, other than the defendants, was liable to repair; but refused to give judgment for the crown *non obstante veredicto*. (*R. v. Eastrington*, 5 A. & E. 765. See *R. v. Heage*, 2 Q.B. 128.)

If the inhabitants of a parish plead that several included townships are bound by prescription to repair the highways within them, and that part of the highway in question is within one of those townships, and the residue within the other, the plea must specify how much lies within one, and how much lies within the other. (*R. v. Bridekirk*, 11 East, 304.)

Where a parish is indicted for not repairing a highway which they are bound of common right to preserve, they ought not to traverse their own obligation to repair, but merely show the liability to be thrown on others; for it is in this case a traverse of a matter of law, and as such, though often inserted, is demurrable, and should always be omitted. (1 Saund. 23, n. (5); 2 Saund. 159, n. (10); *sed vide R. v. Ecclesfield, Inhabitants of*, 1 B. & Ald. 348.)

Where the defendants are charged as bound to repair from custom, prescription, or tenure, they may, under the general issue, negative the duty thus alleged, and throw the burthen on the parish, or even on a particular individual or district. (*Comb.* 396; *R. v. Norwici Inhab. Civitatis*, 1 Stra. 181—183; 2 Saund. 159 b, n. (10); *R. v. Scarisbrick, Inhabitants of*, 6 A. & E. 509.) And the reason of this distinction is, that the prosecutor must, in order to support his charge, prove the defendants to be thus chargeable; and therefore they are at liberty to disprove it by opposite evidence. (*R. v. City of Norwich*, 2 Saund. 158, n. (10).)

Where a special plea is unnecessary, and the whole defence might be given in evidence under the general issue, if the defendant will unnecessarily plead specially that he is not bound to amend, he must go further, and state in whom the duty exists. (*R. v. Yarton*, 1 Sid. 140. See *ante*, p. 1076.) And it will be necessary to traverse the obligation which the indictment alleges. (*R. v. Stoughton*, 2 Saund. 159, n. (10).)

An objection that the description of a highway in an indictment for the non-repair of it is too indefinite, as being equally applicable to several highways, should, according to a *nisi prius* decision, be taken by plea in abatement; and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. (*R. v. Hammersmith*, 1 Stark. C. N. P. 357. See *ante*, p. 1072.)

To an indictment against the inhabitants of the parish of A. for the non-repair of a highway, the defendants pleaded that from time immemorial the inhabitants of the parish G., in consideration of levying and receiving rates on certain lands in the parish of A. adjoining the highway, have repaired and ought to repair the highway; to which there was a replication that the said agreement had been determined by notice. On demurrer to the replication:—Held, that the prosecutors were entitled to judgment, for that the consideration was insufficient to support the alleged liability of G., as neither could the consideration be enforced, nor could it be immemorial, for it must have arisen since the statutes creating the power to levy rates. That the alleged liability, therefore, amounted to no more than an arrangement between the two parishes, which could be put an end to at any time.

Quære, whether in point of law, a parish could be bound by pre-

19. *Proceedings for not repairing.*

Plea, where defendants charged by custom, prescription, &c.

Plea in abatement when highway not sufficiently described.

19. *Proceedings for not repairing.* scription to repair highways in another parish. (*The Queen v. Ashby Folville*, L. R. 1 Q. B. 213.)

Staying proceedings.

Staying Proceedings.—In *R. v. Lincombe* (2 Chit. Rep. 214), it was decided, that the defendant cannot quash the indictment on an affidavit that the way is in repair, but that he ought to plead guilty, and pay a fine. And see *R. v. Wingfield*, 1 Wm. Blackstone, Rep. 602; *R. v. Cheshunt*, Id. 295. As to the judgment and punishment, see *post*, p. 1079.

Evidence.

Evidence.—On an indictment against a parish, it must be shown that the highway is a public one, and also its situation, and the want of repair, as stated in the indictment. If the parish, by special plea, throw the burthen of repair on some other persons, then they must support that plea by evidence of the facts stated therein as to the liability. The evidence, *pro et con.* for these purposes will be found collected under the points noticed in the preceding sections.

How far former acquittal or conviction evidence.

An *acquittal* upon a former indictment, for not repairing a highway is not conclusive evidence, even it be any evidence, to discharge the defendant; it concludes nothing as to the general liability, but only shows that the defendant was not liable at the particular time laid in the former indictment. But yet it has been considered to be such evidence, that upon the *acquittal* of the inhabitants of a parish, the court has suspended the judgment, in order that the case might again be tried without any prejudice from the former verdict. (*R. v. The Inhabitants of Wandsworth*, 1 B. & Ald. 63.) And Lord Ellenborough said, that to maintain the verdict would be to send the parties to a second trial, with a mill-stone about their necks, the weight of which it would be impossible to resist. (See also, *R. v. Burbon*, 5 M. & Sel. 322, *post*, p. 1085.) But it seems that a *conviction* in such a case is conclusive as to the liability, unless fraud can be shown, and fraud is put by way of example. (See *R. v. St. Pancras*, Peake's C. N. P. 219; *R. v. Wandsworth, Inhabitants of*, 1 B. & Ald. 63; *R. v. Whitney*, 7 C. & P. 208; 2 Saund. 159 a, n. (10); *Reg. v. Blakemore*, 21 L. J. M. C. 60; and *Reg. v. Houghton*, 21 L. J. M. C. 89.) As against the parish at large, the judgment is not conclusive, if the defence was conducted by the inhabitants of a particular district, in which the indicted road lay, without any notice to the rest of the parish. (*R. v. Townsend*, Dougl. 421; *R. v. Lancaster*, 2 Saund. 159, n.; *R. v. Eardisland*, 2 Campb. 494.) And it is very questionable whether a *judgment by default*, upon an indictment for the non-repair of a highway, is at all conclusive evidence against the parish of their liability. (See *R. v. Inhabitants of Whitney*, 3 A. & E. 69.)

Reputation.

On an indictment against the inhabitants of a township for not repairing a highway, evidence of reputation was offered by the defendants, that the occupiers of a certain close had used to repair the road; but Lord Kenyon, C. J., would not receive such evidence. He said, that, in an indictment against the *public*, traditional evidence is *admissible*; but not where the public are shifting off the burthen upon an individual; for, perhaps, the tradition may be manufactured by those who want to get rid of the burthen. (*R. v. Wheaton Aston*, Staff. Summ. Ass. 1797; *R. v. Antrobus*, 2 A. & E. 794; *R. v. Wavertree*, 2 M. & Rob. 353, *ante.*) See further as to evidence by reputation, tit. "*Evidence.*"

Award.

Upon an indictment for the non-repair of a road *ratione tenuræ*, it was held, that an *award* made under a submission by a former tenant of the premises could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, it having been made *post litem motam*. (*R. v. Cotton*, 3 Campb. 444.)

View.—It may sometimes be desirable on the part either of the prosecutor or defendant, that the jury should have a view of the place indicted. This cannot, it seems, be granted by the judges at the assizes (1 *Sess. Cas.* 180; 2 *Barnard*, 214; 3 *Chit. C. L.* 574); but may be obtained by removing the proceedings into the Queen's Bench by certiorari, which will, on proper affidavits, be granted. (See 3 *Chit. C. L.* 574); *ante*, tit. "*Certiorari*."

19. *Proceeding for not repairing.*

View.

Costs of Special Jury.—The judge before whom the indictment is tried has power to certify for the costs of a special jury, under s. 34 of 6 Geo. 4, c. 50. (*R. v. Pembridge, Inhabitants of, Jurist*, 1037, Q. B.)

Costs of special jury.

Certiorari.—As to the removal of the indictment by certiorari, see *Certiorari*, the 5 & 6 Will. 4, c. 50, s. 95, *ante*, p. 1070, and the observations and other enactments, under tit. "*Certiorari*."

A prosecutor removing an indictment by certiorari, pursuant to 16 & 17 Vict. c. 30, cannot be made liable for costs in case the defendants obtain the verdict, unless he enters into a recognizance pursuant to s. 5, and if he does not enter into such a recognizance, the certiorari may be disregarded. (*Reg. v. East Stoke*, 13 *W. R.* 737.)

Judgment and Punishment.—The judgment and punishment usually are, that the defendants pay a fine, and repair the highway. (*Bro. Abr. "Nuisance"*, 49; *R. v. Stead*, 8 *T. R.* 142—3; 1 *Hawk. c.* 75, s. 15. See *Russell on Crimes*, 371.)

Judgment and punishment.

Sometimes the court will suspend the judgment. (See *post*, "*Judgment*.")

In one case the court refused to make a rule absolute for a fine for non-repair of a road in the winter months, but enlarged the rule till Easter term. (*R. v. Inhabitants of Walton*, 4 *Jurist*, 195.)

If a justice of the peace grant a certificate, and it appear by affidavit (*a*) that the road is in good condition, and likely to continue so, the court will merely assess a small fine, as 6s. 8d., or 13s. 4d. (*R. v. Incledon*, 13 *East*, 164; *R. v. Loughton, Inhabitants of*, 3 *Smith*, 575; *R. v. Mawbey*, 6 *T. R.* 635.) And they will do so if the certificate state that the way has since been diverted by the order of 2 justices, and that so much of the old way as is retained is in repair. (*R. v. Incledon*, 13 *East*, 166—7.)

At some sessions the practice is not to discharge the inhabitants from the indictment, upon the justice's certificate that it is in repair, and likely to remain so, till the road has undergone a winter's wear; and *Coleridge, J.*, has acted upon this principle in the Queen's Bench, in the case of an indictment of this kind removed there by certiorari. (*R. v. Witney, Inhabitants of*, 5 *Dowl. P. C.* 728.)

Where an individual indicted for not repairing, when bound to do so *ratione tenuræ*, applies to the court to submit to a small fine, on a certificate that the road is put in good repair, which is refused, and afterwards, on the trial, it appears that the repair has been actually effected between the former request and the trial, the court will refuse to set a nominal fine, unless the costs of the prosecutor are paid subsequent to the former application. (*R. v. Wingfield*, 1 *Wm. Black. R.* 602.)

In *Reg. v. Churworth* (6 *Mod.* 163), the defendants were indicted for not repairing a common footway, and confessed it, and submitted to a fine; *et per Curiam*—"The matter is not at an end by the defendants

(a) The court, it would seem, would act upon the justice's certificate alone.

But it is better that there should also be an affidavit. See Form, No. 56.

19. *Proceedings for not repairing.* being fined, but writs of distringas shall be awarded *in infinitum*, till we are certified the way is repaired. But if the party indicted neglect to put the way into proper repair, after having been once fined, no second fine can be imposed on him upon the same proceeding, but a fresh indictment must be brought." (*R. v. Machynlleth*, 4 B. & Ald. 469; *R. v. Old Malton*, *Id.*, n.)

Fines, penalties, and forfeitures, how to be levied and applied.

Application and levying of Fines.—By 5 & 6 Will. 4, c. 50, s. 96, no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the court of Exchequer or other court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or court imposing such fines, issues, penalties, or forfeitures shall order and direct, to be applied towards the repair and amendment of such highway; and the person so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same according to the direction of such justices or court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorised, by warrant under their hands, to make an order on the surveyor of the parish for payment of the same out of the money receivable by him for the highway rate, and shall, within 2 months next after service of the said order on him, pay unto such inhabitant the money therein mentioned.

Observations and decisions.

Where a party had been indicted, and ordered to pay a fine, for not repairing a highway, but, before payment of such fine, effectually repaired the highway, the court held, that he was entitled to a stay of proceedings on the order, and that the prosecutors could not claim the fine upon behalf of third parties for repairs done before the indictment was preferred. (*R. v. Barnard Castle*, 7 *Jurist*, 799.)

See *ante*, p. 1067, n. (c), as to the penalty imposed upon a surveyor of the highways for not repairing a road under the 94th section of the above act, coming out of the highway rate under the above 96th section.

A road found to be a highway must be repaired by the parish, although it may be but little used, and may never have been repaired with hard materials, and although it passes into another parish which desires it to be a highway. The court will not prescribe any particular mode of repair, but will impose a fine equal to the amount necessary to put the road into a substantial state of repair. (*Reg. v. Claxby*, 24 L. J. Q. B. 223.)

This provision is nearly similar to that contained in the repealed act, 13 Geo. 3, c. 78, s. 47.

It was held, that an application under the repealed s. 47, in the 13 Geo. 3, c. 78, for a rate to reimburse the inhabitants of a parish on whom a fine for the non-repair of a highway has been levied, ought to be made in a reasonable time after such levy, so that it may be prior to any material change of the inhabitants. And in one case, the court of King's Bench refused a mandamus to make any rate for reimbursement under that clause, after the lapse of 8 years from the levy. (*R. v. Justices of Lancashire*, 12 *East*, 366.)

In a case decided under the repealed act 13 Geo. 3, c. 78, where a parish, consisting of 2 districts which were bound to repair separately, having been convicted for not repairing a road in one of the districts, the other district not having had notice of the indictment, the

court considered it as substantially the conviction of the one district; and a fine having been levied on an inhabitant of the other, they granted a special mandamus for a rate to be levied on the district bound to repair the indicted part of the road. (*R. v. Townshend*, 2 Dougl. 420.)

19. *Proceedings for not repairing.*

By stat. 3 Geo. 4, c. 126, s. 110, when the inhabitants of any parish, township, or place, shall be indicted or presented for not repairing any highway, being turnpike road, and the court before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges attending the same, between the inhabitants of such parish, township, or place, and the trustees or commissioners of such turnpike road, in such manner as to the said court, upon consideration of the circumstances of the case, shall seem just. And it shall and may be lawful for such court to order the treasurer of such turnpike road to pay the sum so proportioned for such turnpike road out of the money then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the securities of the creditors, who have advanced their money upon the credit of the tolls to be raised thereupon, which order shall be binding upon such treasurer, and he is hereby authorised and required to obey the same.

Apportionment of fine on indictment for non-repair of turnpike road.

The court which imposes the fine has the power, it seems, under this statute, to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the court of King's Bench by certiorari, it was held, that the court of King's Bench might apportion the fine. (*R. v. Upper Papworth*, 2 East, 413. And see *R. v. Pembroke, Inhab. of*, 6 Jurist, 1037.)

Costs of Prosecution of Indictment for not repairing.]—We have seen, (*ante*, p. 1070,) that the 95th sect. of the 5 & 6 Will. 4, c. 50, enacts that the judge of assize, or justices at sessions, before whom the indictment is tried, is to direct that the costs of the prosecution are to be paid out of the highway rate, in cases where magistrates direct the prosecution.

Costs of prosecution, when to be paid out of the highway rate.

A prosecutor had obtained a summons under the 94th section of the above act, calling upon the parish surveyors to show cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates (under the 94th section) ordered an indictment against the inhabitants of the parish, which was preferred, and was tried as a traverse on the Crown side of the assizes, and the defendants found guilty:—Held, that the prosecutor was entitled to an order, under the above 95th section, to have his costs paid out of the highway rate, and that the statute as to this was imperative, and left no discretion whatever in the judge. (*Reg. v. Yarkhill, Inhab. of*, 9 Car. & P. 218.)

So also where the defendants plead, and the jury find as a fact, that another person is liable to repair *ratione tenuræ*, and this although the surveyor at the special sessions for the highways simply denied the liability of the parish. (21 L. J. M. C. 195; *Reg. v. Justices of Surrey*.)

At the March assizes, 1842, an indictment was tried at the assizes against the inhabitants of a parish, who were found guilty, and an order made, upon application to the judge, for the costs of the prosecution in the following words: "It is ordered, &c., that the costs of this prosecution be paid out of the rate made and levied, or to be made and levied, in pursuance of the 5 & 6 Will. 4, c. 50, in the said parish of," &c.—Signed by the judge. The amount of the costs was not ascertained during the assizes. At subsequent assizes for the same county, application was made to different judges to ascertain the amount, and

19. *Proceedings for not repairing.* order the payment; an application was also made at chambers to the judge who tried the indictment, but they declined to do so; and at the summer assizes in 1843, (judgment having been respited from time to time,) the judge then presiding, upon proof that the road had been well repaired, passed a nominal fine upon the defendants, and discharged their recognizances to appear for judgment. In Hilary Term, 1844, a rule *nisi* was obtained for a writ of *mandamus* to the surveyor of the highways of that parish, commanding him to pay to the prosecutor the costs of the prosecution of the indictment, not mentioning any sum. The court refused to interfere, and discharged the rule. (*Reg. on pros. of Bullock v. Clark*, 13 L. J. M. C. 91.)

But where magistrates, under s. 94, ordered an indictment against the inhabitants of the parish, which was found and removed by certiorari; and on the trial of it, the defendants were acquitted, on the ground that it was not a highway, and the prosecutor applied for costs; it was objected, that this provision as to costs only applied where the existence of a highway was not disputed, and also that it did not apply when the indictment was removed by certiorari. The judge refused the order. (*Reg. v. Chedworth, Inhabs. of*, 9 Car. & P. 285; and see *R. v. Paul, Inhabs. of*, 2 M. & Rob. 307.)

And where the defendants are acquitted on the ground of there being no highway, the court is not bound to award costs under this section. (*Reg. v. Paul, Inhabitants of*, 2 M. & Rob. 308; *Reg. v. Challicombe, Id.* 311 n.; *R. v. Chedworth, Inhabs. of*, 9 C. & P. 285.)

When awarded to be paid by party indicted.

By 5 & 6 Will. 4, c. 50, s. 98, it shall and may be lawful for the court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious.

Upon the trial of an indictment for not repairing a highway, removed by certiorari, the judge at *nisi prius* has power to certify under this section. (*R. v. Inhabitants of Pembridge*, 6 Jur. 1037, overruling *R. v. Preston*, 2 M. & Rob. 137.) And see *R. v. Preston* (7 Dowl. 593); where *Williams, J.*, held, that, where an indictment has been preferred at the quarter sessions, and removed by certiorari into the Queen's Bench, that court has power, under the above 98th section to award to the prosecutor costs incurred previous to the removal of the indictment, if the defence has been frivolous or vexatious, in the opinion of the judge trying the cause. And *per Denman, C. J.*, in *R. v. Pembridge, supra*, "The question is, whether the words 'the court before whom the indictment shall be preferred,' may mean the court where the indictment was tried. The word 'preferred' is more general than the word 'tried' in the 95th section, and may admit of several different meanings, applicable to different stages of the prosecution. In *R. v. Upper Papworth*, (2 East, 413,) it was expressly held, that the court before whom the indictment was tried, was a court within the words 'before whom such indictment shall be preferred.' That is a direct authority, and is all that can be required to guide our decision. If, indeed, this is not the true construction of the clause, the enactment would be one of extraordinary imbecility, because, in the great majority of cases, it would be inoperative." This decision is not inconsistent with *R. v. Richards*, (8 B. & C. 420,) which was on a different statute.

This question has recently been again before the courts. In *R. v. Eardisland*, 3 E. & B. 960, an indictment for the non-repair of a highway found at the assizes was removed by certiorari into the Queen's Bench at the instance of the prosecutor, and tried at *nisi prius*, when a verdict was found for the crown. The judge who tried the cause endorsed upon the record, "That the costs of this prosecution be paid out of the rate made and levied in the parish of Eardisland pursuant to 5 & 6 Will. 4, c. 50." It was objected, on application for a rule to

show cause why the order of the judge, and a side bar rule to tax the costs, should not be set aside, that the order was bad:—1st, Because s. 95 of 5 & 6 Will. 4, c. 50, only authorised defendants to remove by *certiorari*; 2ndly, That the order ought to have named the amount of costs. On the first point the rule was refused; on the second point the rule after argument was discharged. The court held that upon a fair interpretation of the act, the judge at *nisi prius*, when the indictment was tried before him, was to make an order, which order was to be carried into effect by the officer of the court of Queen's Bench, ascertaining the amount of costs down to the time at which the last costs were incurred. *Crompton, J.*, however, being of opinion that though the judges' order might be right, yet the court of Queen's Bench had nothing to do with the mode of obtaining the costs. This case came under consideration in *R. v. Ipstones, L. R. 2 Q. B. 216*, when it was distinctly overruled by the court. *Cockburn, C. J.*, *Blackburn, Mellor, and Lush, JJs.*, deciding that s. 95 of 5 & 6 Will. 4, c. 50, imposes the duty of awarding costs to be paid out of the highway rate on the judge of assize or the justices at sessions, as the case may be, before whom the indictment is tried. But when the indictment has been removed by *certiorari*, it is subject to all the incidents which attach to its removal, one of which is that the judge who tries the issue is not a judge of assize but a judge of *nisi prius*, and under this section a judge sitting at *nisi prius*, trying an indictment for the non-repair of a road which has been removed by *certiorari* has no power to order the costs to be paid out of the highway rate.

19. *Proceedings for not repairing.*

The defendant is not mentioned in the act at all, and therefore he has no remedy in case of a frivolous or vexatious prosecution. (*R. v. Inhabitants of Preston*, 7 Dowl. 593, per *Coleridge, J.*) But see 2 *East*, 413, and *Reg. v. Pembridge* (2 G. & D. 5).

Where an indictment for not repairing a highway has been removed by *certiorari*, and the judge, under the above 98th section, has at the trial awarded costs to the prosecutor, which have been allowed by a rule of court, the court will, notwithstanding sect. 103 of 5 & 6 Will. 4, c. 50, enforce obedience to the rule by attachment. It is not necessary that the affidavit of his attorney should state that he was empowered to make the demand for costs. (*R. v. Pembridge, Inhabitants of*, 7 *Jurist*, 553.)

Where the defendants plead guilty to an indictment for non-repair of a highway, the presiding judge may, under s. 95, direct the costs of the prosecution to be paid out of the highway rates of the parish (*Reg. v. Haslemere*, 32 *L. J. M. C.* 30); but if the indictment be preferred under s. 98, and without any preliminary proceedings before justices, then there is no power for the presiding judge to award costs where the defendants plead guilty; because if the defendants plead guilty at the earliest opportunity, whatever their prior conduct may have been, their defence cannot be said to be either frivolous or vexatious. (*Reg. v. Denton*, 34 *L. J. M. C.* 13.)

If the jury be discharged without giving a verdict, they not agreeing, then there is no trial of the indictment, and the judge cannot direct the costs to be paid out of the highway rate. (*Reg. v. Hettesbury*, 8 *L. T. N. S.* 315.)

The following cases, decided upon the 13 Geo. 3, c. 78, s. 65 (which in its terms was very similar to 5 & 6 Will. 4, c. 50, s. 98), are retained in this edition.

In *R. v. Salwick*, (2 *B. & Ad.* 136,) it was held, that such enactment applied only to cases tried in the ordinary course; and where, on an indictment removed by the defendant by *certiorari*, the court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event; it was held, that the special rule took away the authority of the judge to certify in favour of the defendant. (*Ib.*)

The application must have been made to the judge who tried the

19. *Proceedings for not repairing.* indictment; and if this were omitted, the court of King's Bench would not afterwards interfere. (*R. v. Chadderton*, 5 T. R. 272.)

If it was stated on the back of the record that the defence was frivolous or vexatious, this would suffice, without proceeding to award costs to the prosecutor. (*R. v. Clifton*, 6 T. R. 344; *R. v. St. John, Margate*, 6 M. & Sel. 130.)

It was also held, that it was a matter to be determined by inquiry, whether a person was or was not the prosecutor within this enactment; and that a court of quarter sessions, before whom a parish was acquitted upon trial of an indictment for not repairing a highway, might, by their order, award C. and E. to pay costs to the parish, although the names of C. and E. were not on the back of the indictment, and although the indictment originated in a presentment of A. and B., constables, whose names were on the indictment; and it was also held to be enough if the order was entitled as in the prosecution of C. and E., without showing further that C. and E. were prosecutors; and that it need not have appeared on the face of the order that the indictment was tried, if that appeared by the record of the proceedings; and also that the order was good in form, if it were for the payment of the costs to the solicitor of the parish. (*R. v. Commerell and Ellis*, 4 M. & Sel. 203.)

Costs on removal
by certiorari.

By stat. 5 W. & M. c. 11, s. 3, if the defendant, prosecuting such writ of certiorari as therein mentioned, be convicted of the offence for which he was indicted, the court of King's Bench shall give costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, &c., or any other civil officer who shall prosecute upon account of any fact committed or done that concerned him or them as prosecuting officers.

Under the above provision it has been held, that a justice of the peace who indicts a road, which is out of repair, is entitled to his costs after a removal of the indictment by certiorari, if the defendant be convicted. (*R. v. Kettleworth*, 5 T. R. 33. And see *R. v. Penderryn*, 2 T. R. 260.)

Several persons were held entitled to costs under the 5 W. & M. c. 11, as prosecutors of an indictment removed by certiorari, one as constable of the manor within which the highway lay, the others as parties aggrieved, they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. (*R. v. Taunton, St. Mary*, 3 M. & Sel. 465.)

But a mere nominal prosecutor is not entitled to costs under the above section, as a party grieved or injured. (*R. v. Barnard's Castle, Inhab. of*, 5 Jurist, 799.)

Therefore, in a case where he did not apply for the costs until 2 years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and it was stated that, while the highway was stopped, he had declared that he did not care about it, the court held that he was not entitled to costs, as the party grieved, although the prosecution was at his instance and expense. (*R. v. Incedon*, 1 M. & S. 268.)

The amount of the costs when ordered to be paid by the judge of assize, should be ascertained by the clerk of the peace, and by him inserted in the order. (*Reg. v. Clark*, 5 Q. B. 887.)

The order for costs should show out of what fund they are to be paid, and if it does not, it is bad. (*Reg. v. Watford*, 4 D. & L. 593.)

See further as to who are parties aggrieved, *ante*, p. 1038, and *post*, p. 1090.

And see further as to costs, *tit. "Costs."*

As to how expenses of defending prosecutions agreed upon at a vestry meeting are to be paid, see *post*, p. 1095.

New Trial. Suspending Judgment.—The courts will not grant a new trial in a criminal proceeding after a verdict of not guilty. (*R. v. Burbon*, 5 M. & S. 392. *Et per* Ld. *Ellenborough*, “In general the rule is not to grant a new trial in a criminal proceeding, after a verdict of not guilty. And inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right. (And see *R. v. Sutton*, 5 B. & Ad. 52.)

19. *Proceedings for not repairing.*

New trial. Suspending judgment.

But in one case, where the jury had been misdirected, the court, after verdict for the defendant, suspended the judgment, in order that a new indictment might be preferred. (*R. v. Challicombe*, 6 Jur. 481.)

And in another case, after a verdict for the defendant upon an indictment for the non-repair of a highway, the court refused an application for a new trial, on the ground of the improper rejection of evidence; but suspended the judgment, in order that another indictment might be preferred; see *R. v. Wandsworth*, 1 B. & Ald. 63.

In *Reg. v. Johnson*, 29 L. J. M. C. 133, the court of Queen's Bench refused a writ for a new trial, on the ground that the verdict of not guilty was against the weight of evidence. *Hill, J.*, adding that the verdict of not guilty does not bind the right.

In one case, for the furtherance of justice, judgment upon a verdict of guilty was postponed, till another cause, involving the same question, was tried. (*R. v. Oxford*, 16 East, 223.)

If a point of law arises on the trial, leave is frequently given to move to enter a verdict of acquittal. (*R. v. Gash*, 1 Stark, 445. See also Lord *Kenyon's* observation, *R. v. Mawbey*, 6 T. R. 619.)

Judgment non obstante veredicto.—The court will not give judgment non obstante veredicto, unless the merits of the case be clear. (*Bennett v. Holbeck*, 2 Wms. Saund. 319 (f); *R. v. Eastington*; 5 A. & E. 765.)

Judgment non obstante veredicto.

3. INFORMATION IN QUEEN'S BENCH FOR NOT REPAIRING.

An information for not repairing a highway may be granted, in the discretion of the Queen's Bench. (*Raym.* 384; *R. v. Steyning*, Say. 92.) But it is never allowed, unless in cases of great importance, or where the grand jury have been guilty of gross misbehaviour in refusing to find the bill, because the fine, on conviction on such a proceeding, cannot be applied to the repair of the nuisance, which is always the case when the party is indicted. (*Bac. Ab. tit. "Highways."*)

Information for non-repairs.

4. MANDAMUS FOR NOT REPAIRING.

In *R. v. The Trustees of Oxford and Witney Turnpike Roads* (12 A. & E. 427), the court refused to entertain an application for a mandamus to repair a road. In this case the question was, which of 2 parties was liable to the repair, under local acts of parliament; *et per Denman, C. J.*, in this case—“I know no instance of a mandamus to repair a road. If we entertained applications for writs of mandamus in such cases we might have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability.”

But it would seem that, in some cases, the court of Queen's Bench would issue a mandamus, to compel a party to reinstate or repair a highway. (See *R. v. Severn Railway Company*, 2 B. & Ald. 646; *R. v. Commissioners of Dean Inclosure*, 2 M. & S. 80; *R. v. The Bristol Dock Company*, 1 G. & D. 287; *R. v. Llandilo Roads (Commissioners of)*, 2 T. R. 232.)

Where a railway was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was

20. *Books and materials, &c.*

provided that the public should have the beneficial enjoyment of the same, and the company afterwards took up the railway, it was held that a mandamus might issue to compel the company to reinstate and lay down again the railway. (*R. v. The Severn Railway Company*, 2 B. & Ald. 646.) See post, tit. "*Mandamus*."

See *R. v. Justices of Dorset* (15 East, 594), as to a writ of prohibition.

5. ENTERING AND REPAIRING HIGHWAY.

Entering and repairing.

It seems that if a highway be out of repair, an individual may repair it, and justify an entry for that purpose. (*Earl Lonsdale v. Nelson*, 2 B. & C. 302.)

6. PRESENTMENTS FOR NON-REPAIR OF HIGHWAYS ABOLISHED.

No presentment against inhabitants for highway being out of repair.

By 5 & 6 Will. 4, c. 50, s. 99, from the commencement of this act it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair.

XX. Books and Materials, &c., in whom Vested, and by whom to be kept, &c.

The property in books and materials, &c., to be vested in surveyor.

By 5 & 6 Will. 4, c. 50, s. 41, all the said books, papers, writings, and accounts, and all materials, tools, and implements which shall be provided in pursuance of this act for repairing or preserving the highways, and also the scrapings of the said highways, shall be vested in the surveyor for the time being; or in case a district surveyor shall be appointed, then all such books, papers, writings, and accounts, and all materials, tools, implements, and scrapings shall be invested in the district surveyor.

A surveyor of the highways, quitting office (before stat. 5 & 6 Will. 4, c. 50), claimed a sum as due to him from the parish; and, on the sum being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens, and, in a subsequent year, they were also demanded by the churchwardens of the latter year:—Held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and, *semble*, that no parish officer of any year was so entitled. (*Addison v. Round*, 4 A. & E. 799.)

In whom property to be described in indictment.

By 7 Geo. 4, c. 64, s. 16, in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements, provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike-road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.

In framing an indictment under this section of the above act, it must be remembered that the statute cited does not extend to all the matters mentioned in the new act, nor in terms to the case of a district surveyor. (*Shelford*, 62.)

By 11 & 12 Vict. c. 43, s. 4, in any information or complaint on the proceedings thereon in which it is necessary to state the ownership of any property, all materials and tools for the repair of the highways provided at the expense of the parishes or districts in which such highway is situate may be therein described as the property of the surveyor of such highways without naming him.

XXI. Costs on Informations, and Complaints before Justices.

By 5 & 6 Will. 4, c. 50, s. 97, if any surveyor or other person shall be summoned before any justice to answer any information or complaint exhibited or made against him touching or concerning any offence committed or alleged to have been committed by such surveyor or other person against the provisions of this act, or for any supposed neglect of duty, in case such surveyor or other person be convicted thereof, such justice shall be authorised and empowered to order the payment by such surveyor or other person of all costs or proceedings against him; but in case such information or complaint shall afterwards be withdrawn or quashed or dismissed, or if the defendant shall be acquitted of the offence or neglect of duty charged against him, it shall be lawful for such justices to order and award that the person exhibiting or making such information or complaint shall pay to the defendant all such costs as to such justice shall seem reasonable; and in default of immediate payment of the sum so awarded, it shall be lawful for such justices to cause the same to be levied by distress and sale of the goods and chattels of the person ordered to pay the same, together with the costs of such distress and sale; and if goods and chattels of such person sufficient to answer the sum so awarded, with such costs as aforesaid, cannot be found, it shall be lawful for such justices to commit such person to the common gaol or house of correction, there to be kept to hard labour, for any time not exceeding 1 calendar month, unless the sum so awarded, together with all costs and expenses, shall be sooner paid and satisfied.

This section only applies where an offence has been committed. (*George v. Chambers*, 11 M. & W. 149, 155, per *Alderson*, B. See this case, *ante*, p. 1069.)

As to distresses in general under magistrate's warrant, see tit. "*Distress under Justice's Warrant*."

As to commitments, see "*Commitment in Execution*."

As to costs to prosecutor on indictment for not repairing highways, see *ante*, p. 1081. As to costs in general, see *ante*, "*Costs*."

22. Compelling attendance of witnesses.

5 & 6 Will. 4, c. 50.

Justices empowered to award costs to informer.

Costs of defendant.

Distress.

Commitment for, with hard labour.

XXII. Compelling attendance of Witnesses.

By the 5 & 6 Will. 4, s. 102, if any person, after having been paid or tendered a reasonable sum of money for his costs, charges, and expenses, shall be summoned as a witness to give evidence before any justices of the peace touching any matter or fact contained in any information or complaint for any offence against this act, either on the part of the prosecutor or the person accused, and shall refuse or neglect to appear at the time and place for that purpose appointed, without a reasonable excuse for his refusal or neglect, or appearing shall (after having been paid or tendered a reasonable sum for his costs, charges, and expenses) refused to be examined upon oath and give evidence before such justice of the peace, then and in either of such cases such person shall forfeit for every such offence any sum not exceeding 5*l*.

See a corresponding section in the turnpike act, 3 Geo. 4, c. 126, s. 138.

As to evidence and witnesses in general, see *ante*, "*Evidence*."

Compelling witnesses to attend and give evidence. Penalty for non-attendance.

Evidence in general.

23. *Mode of recovering, and application of penalties.*

5 & 6 Will, 4, c. 50. Justices may proceed by summonses in the recovery of penalties.

No information in writing requisite.

Forfeitures, costs, and charges, may be levied by distress and sale (b).

Security for appearance at return of distress.

XXIII. Mode of Recovering, and Application of Penalties.

By 5 & 6 Will 4, c. 50, s. 101, In all cases in which any penalty or forfeiture is recoverable before justices of the peace under this act, it shall and may be lawful for any justice to whom complaint shall be made of any such offence to summon (a) the party complained against before any two justices, and on such summons the said two justices may hear and determine the matter of such complaint, and on proof of the offence convict the offender, and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same, although no information in writing shall have been exhibited or taken by or before such justice; and all such proceedings by summonses without information shall be as good, valid, and effectual, to all intents and purposes, as if an information in writing was exhibited.

As to the summoning of offenders in general, see "*Conviction*," Vol. I.)

As to seizing and obtaining unknown offenders, see sect. 79, *ante*, p. 1061.

Sect. 103. All penalties and forfeitures by this act inflicted or authorised to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this act (the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed), shall upon proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any credible witness or witnesses (which oath such justices are in every case hereby fully authorised to administer), or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and conviction, by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant (c) under the hands of two or more justices before whom the party may have been convicted (which warrant such justices are hereby empowered and required to grant); and the overplus (if any), after such penalties, forfeitures, and fines, and the charges of such distress and sale are deducted, shall be returned, upon demand, unto the owner or owners of such goods and chattels; and in case such fines, penalties, and forfeitures shall not be forthwith paid upon conviction, then it shall be lawful for such justices as aforesaid to order the offender or offenders so convicted to be detained and kept in safe custody (d) until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security, to the satisfaction of such justices as aforesaid, for his or their appearance before such justices on such day or days as shall be appointed for the return of such warrant of distress, such day not being later than seven days from the time of taking any such security, and which security the said justices as aforesaid are hereby empowered to take by way of recognisance or otherwise; or in case it shall appear to the satisfaction of such justices, either by the confession of the offender or otherwise, that he hath not goods or chattels within the jurisdiction of such justices sufficient whereon to levy all such penalties and forfeitures, costs and charges, such justices may, at their discretion, without issuing any warrant of distress,

(a) See form of the summons, *post*, No. 28.

(b) As to the mode of proceeding by distress under a magistrate's warrant, &c., and the mode of enforcing penalties in general, see *ante*, "*Dis-*

tress by Warrant."

(c) See form, *post*, No. 36.

(d) As to this being in writing under the hand of the justices, see *Still v. Walls*, 7 East, 533, and tit. "*Commitment in Execution*."

commit (b) the offender for such period of time, and in such and like manner, as if a warrant of distress had been issued, and nulla bona returned thereon; but if a warrant of distress shall be issued, and upon the return thereof (c) it shall appear that no sufficient distress can be had whereupon to levy the said penalty, forfeiture, or fine, and costs and expenses aforesaid, and the same shall not be forthwith paid, or in case it shall appear to the satisfaction of such justices, upon the confession of the offender or otherwise, that he hath not sufficient goods and chattels whereupon such penalty, forfeiture, or fine, costs and expenses, could be levied if a warrant of distress were issued, such justices shall not be required to issue such warrant, but in such case such justices are hereby required, by warrant under their hands to cause such offender or offenders to be committed to the common gaol or house of correction of the county, riding, or place where the offender shall be or reside, there to be kept to hard labour for any term not exceeding 3 calendar months, unless such penalties, forfeitures, and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied; and the penalties and forfeitures, when so levied, shall be paid, the one half to the informer, and the other half to the surveyor of the parish where such offence, neglect, or default shall happen, to be applied towards the repair of the highways thereof, unless otherwise directed by this act; but in case the surveyor shall be the informer, then the whole shall be applied towards the repair of such highway.

The non-payment of costs awarded by an order of quarter sessions, on the trial of an appeal against the stoppage of a highway, under the 90th section of the above act, is not an offence forming a subject for conviction under sects. 101 and 103; but the nonpayment of them may be enforced by distress warrant, issued by two justices, under s. 103, grounded directly upon the order of sessions. (*Selwood v. Mount*, 1 Q. B. 727.) *Et per Lord Denman*, in delivering the judgment of the court in this case, "The 103rd section must be read *reddendo singula singulis*, and the true construction of it is, that the justices shall issue their warrant upon a conviction, where there has been an offence for which a penalty or forfeiture is inflicted or authorised to be imposed; and 'upon order made as aforesaid,' when costs have been awarded and not paid; notwithstanding the words, 'under the hands of two or more justices before whom the party may have been convicted.'"

See *ante*, p. 1041, where a warrant purporting to have issued under this section was held to be illegal, and that no property passed to the vendee of goods seized and sold under such warrant.

As to enforcing obedience to a rule of court, notwithstanding this section, see *R. v. Pembridge (Inhab. of)*, 7 Jur. 553.

XXIV. Forms of Proceedings.

By 5 & 6 Will. 4, c. 50, s. 118, The forms of proceedings relative to the several matters contained in this act, which are set forth and expressed in the schedule hereto annexed, shall be used upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made or advantage taken for want of form in any such proceedings by any person whomsoever.

As to enactments of this description, see "*Conviction.*"

According to *R. v. Casson* (3 D. & R. 40), such an enactment is only directory.

24. Forms of proceedings.

5 & 6 Will. 4, c. 50.

Commitment for non-payment (a).

Application of penalties.

(a) See the form, No. 38, *post*.

see "*Commitment in Execution.*"

(b) As to commitments in general,

(c) See form, No. 37, *post*.

25. *Appeal against rates, &c.*

A material variation, however, from the form prescribed, is fatal, and may be taken advantage of in a collateral proceeding. (*Davidson v. Gill*, 1 East, 64. See further, tit. "Conviction.")

5 & 6 Will. 4, c. 50.

XXV. *Appeal against Rates and Proceedings, &c.—Want of Form, &c.—Certiorari, &c.—Special Case.*

Appeal may be made to quarter sessions against rate, &c.

Notice of.

Recognisance.

Costs.

By 5 & 6 Will. 4, c. 50, s. 105, If any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant, first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, (a) notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds of such appeal, within 14 days after such rate shall have been made, or cause of complaint shall have arisen, and within 4 days after such notice entering into a recognisance before some justice, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such general or quarter sessions; and such justices upon hearing and finally determining the matter of such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: provided, nevertheless, that in case there shall not be time to give such notice and enter into recognisances as aforesaid before the next sessions to be holden after the making of any rate, or the cause of complaint shall have arisen, then, and in every such case, such appeal may be made to the next following sessions, and shall be then heard and determined: provided also, that it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid (b).

By sect. 106. In all cases of appeal against the rate or assessment made in pursuance of this act, the provisions of 41 Geo. 3, c. 23, are applicable.

Rates and proceedings not to be quashed for want of form.

Certiorari.

In case of appeal, sessions may grant a special case.

Sect. 107. Provided always, that no rate, nor any proceeding to be had touching the conviction of any offender against this act, or any order made, or any other matter or thing done or transacted in or relative to the execution of this act, shall be vacated or quashed for want of form, or be removed or removable (except as herein mentioned) by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster.

Sect. 108. In any case of appeal, the court of quarter sessions before whom the same is heard and determined may, if they think fit,

(a) A delivery of the notice of appeal at the dwelling house of the respondent is sufficient. (*Reg. v. Justices of North Riding*, 7 Q. B. 154.)

(b) This claim gives the right of

appeal against the decision of special sessions under sect. 23 of the 5 & 6 Will. 4, c. 50. (*Reg. v. Justices of Derbyshire*, E. B. & E. 69.)

state the facts specially for the determination of his Majesty's Court of King's Bench thereon, in which case it shall be lawful to remove the proceedings, by writ of certiorari or otherwise, into the said court of King's Bench.

As to the notice of, and proceedings upon an appeal and on a special case, &c., see fully, *tit. "Appeal," "Sessions."*

The right of appeal under the above 105th sect. of the 5 & 6 Will. 4, c. 50, is confined to those cases where no other method of relief is provided.

No appeal lies to the quarter sessions against the allowance of the surveyor's account at petty sessions (*R. v. Justices of West Riding*, 1 Q. B. 624; and see *R. v. Justices of West Riding of Yorkshire*, 5 T. R. 629; and *R. v. W. Mitchell*, *Id.* 701); nor against the disallowance of them (*Reg. v. J. P. of Leicestershire*, 8 E. & B. 557). But where there is an appeal to the quarter sessions from the decision of the special sessions, and the quarter sessions dismiss the appeal they may award costs, under 12 & 13 Vict. c. 45, ss. 5, 6. (*Reg. v. Padwick*, 27 L. J. M. C. 113.)

This right of appeal is not given to all persons, but merely to the party aggrieved, or in other words, to those only who have sustained some special and peculiar injury, and not to any captious persons whatsoever. The notice must state that the appellant is aggrieved, or it must appear therefrom that such is the case. (*R. v. Justices of Essex*, 5 B. & C. 431. And see *ante*, p. 1039.)

Every parishioner is aggrieved by the appointment by the justices of a bad surveyor, and may appeal against the appointment; and if an inhabitant of a township claims an exemption from the repair of all roads not situated within the township, the proper, and it seems the only remedy is, to appeal against the appointment of a surveyor for the whole parish. (*R. v. Justices of St. Albans*, 3 B. & C. 698.) See as to who may be considered a party aggrieved, in the case of turning, diverting, or stopping up a highway, *ante*, p. 1039.

The 88th, 89th, and 90th sections provide as to the remedy by appeal against diverting, turning, or stopping up of highways. (See *ante*, p. 1038.)

As regards the time of giving the notice of appeal, where a levy was made under a warrant of distress, it was held that the real injury was the distraining, because it did not necessarily follow that the warrant would be enforced; consequently, that notice given after the actual distress was sufficient. (*R. v. Devon Justices*, 1 M. & S. 411.)

See further as to the time when the notice of appeal ought to be given, *ante*, p. 1039; and *ante*, *tit. "Appeal."*

It has been held, that a party appealing against a conviction by two justices upon complaint of the surveyors, for an offence under the 5 & 6 Will. 4, c. 50, s. 47, must serve notice of appeal, under the above 105th sect. on both the justices. A notice in such a case addressed to both the justices and surveyors, and served on the latter, and on one justice only, is not sufficient. (*Reg. v. Bedfordshire (Justices)*, 11 Ad. & E. 134.)

As to the statement of the grounds of appeal, see *tit. "Appeal."*

As to s. 107, in respect of the writ of *certiorari*, it is observable, that the prosecutor, under this statute, is not debarred from having the writ. (*R. v. Burgess*, *Say. Rep.* 128. And see *R. v. Clace, Inhabitants of*, 4 Burr. 2456.) When the Crown is bound by such an enactment as this, see *ante*, *tit. "Certiorari."*

As to whether the court can proceed by consent where the *certiorari* is taken away, see *R. v. Micklethwaite*, 4 Burr. 2522; see also *R. v. West Riding of Yorkshire Justices*, 3 N. & M. 802.

We have seen that the *certiorari* is saved to the defendant by s. 95 (*ante*, p. 1070), in cases of indictment for non-repair. But the defendant must use his privilege before trial, it will be too late after conviction; and it is not competent for him to move for such a writ in order to

25. *Appeal against rates, &c.*

5 & 6 Will. 4, c. 50. Observations upon these enactments. Proceedings upon appeal and special case.

Right of appeal under above 105th section.

Notice of appeal.

Certiorari and want of form in proceedings.

26. *Actions for damages, &c.*

5 & 6 Will. 4, c. 50.

take objections to the indictment. (See *Regina v. Dixon*, 1 Salk. 150; *R. v. Pennegoes*, 1 B. & C. 142; *R. v. St. Albans*, 3 B. & C. 698.)

The statute 13 Geo. 3, c. 78, provided that no proceedings to be had or taken in pursuance of that act should be quashed for want of form or removed by *certiorari*; it will be observed that the expression in the new act is, "in or relative to the execution." (See *R. v. Somersetshire*, 5 B. & C. 816; *ante*, "*Certiorari*," decided upon the repealed act.) In *R. v. Casson* (3 D. & R. 36; and see *R. v. Justices of Cambridgeshire*, 4 Ad. & E. 115, *per Patteson, J.*), a writ of *certiorari* was quashed on the ground that the order was a proceeding in pursuance of the repealed statute 13 Geo. 3, c. 78.

As to the writ of *certiorari* in general, see tit. "*Certiorari*."

As to the 107th clause, with respect to proceedings not being quashed for want of form, see tit. "*Conviction*."

Sessions may grant a special case under section 108.

Under s. 108 the justices may state a case for the opinion of the court of Queen's Bench, informing them how an appeal under s. 88, was left to the jury, and asking them their opinion whether it was correctly left. (*R. v. Shiles*, 1 Q. B. 926.)

Secs. 2, 3, 4, 100, 112, 116, relating respectively to the repealed acts, London streets and certain bridges in Wales, are not printed in this edition.

XXVI. *Actions for Damages, &c.*

Satisfaction recoverable for special damage; but distress not to be deemed unlawful for want of form in the proceedings.

Plaintiff not to recover for irregularity if tender of amends made.

Payment into court.

Notice of action. Tender of satisfaction. Limitation of actions.

By 5 & 6 Will. 4, c. 50, s. 104, where any distress shall be made for any sum of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any default or want of form in any proceedings relating thereto, nor shall the party distraining be deemed a trespasser *ab initio* on account of any irregularity which shall be afterwards done in making the distress, but the person aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case: provided always, that no plaintiff shall recover in any action for any irregularity, trespass, or wrongful proceedings, if tender of sufficient amends shall be made by or on behalf of the party who shall have committed or caused to be committed any such irregularity, trespass, or wrongful proceedings, before such action brought; and in case no such tender shall have been made, it shall and may be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit, whereupon such proceedings or orders and judgment shall be had, made, and given in and by such court as in other actions where the defendant is allowed to pay money into court.

The surveyors are only protected when acting *bonâ fide*, and the tender of amends made by them cannot be questioned in an action at law. (*Boyfield v. Porter*, 13 East, 200.)

Sect. 109. No action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this act until 21 days' (a) notice has been given thereof in writing to the justice, sur-

(a) But by the 5 & 6 Vict. c. 97, s. 4, from and after the passing of it, "in all cases where notice of action is required, such notice shall be given one calendar month, at the least, before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding. But, by the 6th section of the act, it is not to extend to any action, bill,

plaint, or information, or any legal proceeding of any kind whatsoever, commenced before the passing of the act, but such proceedings may be thereupon had and taken in all respects as if this act had not passed.

Where the surveyor has reasonable ground for believing that he is acting under the authority of the Highway Act, he is entitled to notice of action, and therefore when he left unfenced

veyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after 3 calendar months next after the fact committed for which such action or suit shall be so brought; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place; and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before 21 days' notice thereof given as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein; and if a verdict shall be found for such defendant, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if, upon any demurrer in such action, judgment shall be given for the defendant therein, then and in any of the cases aforesaid such defendant shall have costs as between attorney and client, and shall have such remedy for recovering the same as any defendant may have for his or her costs in any other case by law (b).

26. *Actions for damages, &c.*

5 & 6 Will. 4, c. 50

Venue (a).

General issue.

Costs.

Under this section a surveyor of highways is not liable in an action for damages resulting from an accident caused by the non-repair of the highway, the legislature never having intended to create a personal responsibility in the surveyor. (*Mackinnon v. Penson*, 23 L. J. Ex. Ch. 97; *Young v. Davis*, 31 L. J. Ex. 250.) A person who has been appointed surveyor, but informally, is entitled to the protection of the 109th sect. if he acts in the supposed exercise of his duty. (*Huggins v. Waydey*, 15 M. & W. 357.) So where a board of highways ordered their surveyor to open a certain road to the public by removing the obstructions therefrom, believing that the same was a public footway, it was held, in an action of trespass brought against the surveyor and certain members of the board, for forcible removal of the said obstructions, it being admitted that the defendants acted *bona fide* in committing the trespass, that they were entitled to notice of action, although there is no specific clause giving the surveyors power to open footways. (*Smith v. Hopper*, 9 Q. B. 1005.) So where the declaration charged the defendant with neglect of duty as surveyor, in allowing gravel to remain upon the highway, whereby the plaintiff had been

Notice of action.

an excavation in a highway for the purpose of erecting a weighing machine, whereby an accident occurred, the Court of Exchequer held that he was entitled to notice. (*Hardwick v. Moss*, 7 H. & N. 136.)

This section, (the 109th), by requiring only 21 days' notice of action to be given, does not repeal the 1st section of 24 Geo. 2, c. 44, which entitles a justice of the peace to one calendar month's notice. (*Rix v. Borton*, 12 Ad. & Ell. 470; and see *Morgan v. Leach*, 10 M. & W. 558.)

(a) See *Bazing v. Skelton*, 5 T. R. 16.

(b) By the 5 & 6 Vict. c. 97, s. 2, so much of any clause, enactment, or provision, in any public act or acts, not local or personal, whereby it is enacted or provided that either

double or treble costs, or any other than the usual costs, between party and party, shall or may be recovered, shall be and the same are hereby repealed: Provided always, that, instead of such costs, the party or parties heretofore entitled under such last-mentioned acts to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer." See the 4th section of this act, *ante*, p. 1092, n. (a), as to the act not extending to any action commenced before the passing of it.

27. *Amount of fees to be taken.*

injured, he was held entitled to notice of action, as being charged with a thing done in pursuance of the act, although it was proved that he had notice of the gravel being there, and had been guilty of want of care in leaving it there. (*Davis v. Curling*, 8 Q. B. 286.) The surveyor may remove nuisances under the powers contained in the 73rd section, but he is not bound to do so, however dangerous they may be. (*Morgan v. Leach*, 10 M. & W. 558; but see 11 & 12 Vict. c. 123, s. 6.)

Observations on this enactment.

As to the construction of enactments of this description, and when a party is entitled to notice of action, see "*Justices*," "*Constable*."

As to notice of action.

There is a distinction between cases where the action is brought for penalties for doing what the act prohibits, and where it is brought in consequence of anything done in pursuance of the act. In the former case no notice of action is necessary. (*Charlesworth v. Rudgard*, 1 C. M. & R. 498. And see *Wright v. Horton*, *Holt's N. P. C.* 450, and the cases, *post*, "*Justices*,")

The omission to do any act is a "thing done" within the meaning of the act. Therefore, where surveyors undermined a wall, which fell eight months afterwards, an action which was brought within three months after the falling was held to be within time. (*Roberts v. Read*, 16 East, 215. See also *Gillon v. Boddington* 1 R. & M. C. N. P. 161, which was a similar case; also *Sutton v. Clarke*, 6 Taunt. 29.)

In *Wordsworth v. Harley and Others*, (1 B. & Ad. 391, decided under the repealed act 13 Geo. 3, c. 78,) the plaintiff, a reversioner of land, declared against the defendant (a surveyor of highways) for digging, &c., his close, separating a portion of it from the residue, and keeping it so separated, and adding such portion to the public road. The separation was by a wall, which was begun more than 3 calendar months before the action was brought; it was at that time very low, but formed a complete division between the parcels of land. After the commencement of the 3 months, the wall was raised and finished. It was held, that, as there was a complete separation before that period, the raising of the wall, or its continuance, was not such a new act as would take the case out of the limitation in the above clause; *et per Bayley, J.*—"The continuation in this case is not a new fact committed within the statute. If it had the operation contended for, you might claim to bring an action at any time within 20 years." Lord Tenterden, C. J.—None of the acts complained of in the declaration were done within the time limited by the statute. The digging soil, taking away earth, and throwing down fences, and the erecting of a wall, happened before that period; and the separation of the two parts of the close was complete before then. It therefore seems to me, however unfortunate the case may be for the plaintiff, that the action cannot be maintained."

As to the costs the defendant is now entitled to, see *ante*, p. 1093, n. (b).

XXVII. Amount of Fees to be taken.

5 & 6 Will. 4, c. 50.
Amount of fees.

By 5 & 6 Will. 4, c. 50, s. 110, "The several fees hereafter limited and expressed, and no others, shall be taken by the clerk of the peace, clerk to the justices, or others, for their several respective services in the execution of this act; (that is to say); the sum of 6d. for every information; the sum of 1s. for every summons or warrant, and 6d. for the service thereof; the sum of 6d. for every notice, and 6d. for the service thereof; the sum of 1s. for every order, and 6d. for the service thereof; the sum of 2s. for every warrant of distress; the sum of 1s. for every appointment; and the sum of 2s. for every conviction: provided always, that

in no place regulated by a local act of Parliament, when the amount of the fees to be taken by the clerk to the justices, or others, in any proceeding for the recovery of any rate, shall be less than the fees herebefore mentioned, shall it be lawful for such clerk to the justices or others to demand or take a greater fee for any similar proceeding under this act than the fee which may be mentioned or directed to be taken by such local act."

28. *Surveyor empowered to charge, &c.*

5 & 6 Will. 4, c. 50.
Saving as to local acts.

XXVIII. Surveyor empowered to Charge in Account Expenses of Legal Proceedings.

By 5 & 6 Will. 4, c. 50, s. 111, "If the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and (a) allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates, authorised to be collected and raised by virtue of this act: provided nevertheless, that if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorised to make, collect, and levy an additional rate in the same manner as the rate by this act is authorised to be made for the repair of the highway."

Expenses for defending prosecutions agreed upon at a vestry meeting, how to be paid.

The former enactment on this subject was the 13 Geo. 3, c. 78, s. 65, but the above is somewhat different. In *Reg. v. Fowler*, (1 A. & E. 836;) it was held, under the former act, that law expenses incurred in resisting a rule for a *certiorari* were expenses which might be inserted in the waywarden's account, and so allowable or not, at the discretion of the justices. The court came to this conclusion, upon a full understanding that the occasion in question was not one of those particularly specified in the 65th section. And they further said, that all *bonâ fide* expenses incurred by the waywarden in pursuance of his duties might be so inserted for allowance.

As to the surveyor's accounts, see *ante*, p. 1027.

The surveyor of highways for a parish may charge in his accounts the law expenses incurred in respect of an appeal against an order of justices, which was agreed to at a vestry or public meeting of the inhabitants, or expenses which have been allowed by two justices acting for the county or division within which such highway is situated. (*Townsend v. Read*, 30 L. J. M. C. 245; 10 C. B. N. S. 317.) But he could not so charge them unless they had been incurred pursuant to an order of the vestry; and if he does so incur them and afterwards makes an agreement with the vestry to pay a part of them, his successor cannot recover such sum from him, there being no privity of contract between the outgoing surveyor and his successor. (*Kilham v. Collier*, 21 L. J. Q. B. 65.)

(a) This "and" is to be read "or." (*Townsend v. Read*, 30 L. J. M. C. 245.)

30. *Highways into districts—Formation of.*

5 & 6 Will. 4, c. 50.
Not to extend to turnpike roads, or to roads under local acts.

Nor to affect the universities.

Nor city of London.

XXIX. Exemptions from the 5 & 6 Will. IV. c. 50.

By 5 & 6 Will. 4, c. 50, sect. 113. "Provided always, that nothing in this act contained shall apply to any turnpike roads, except where expressly mentioned, or to any roads, bridges, carriageways, cartways, horseways, bridleways, footways, causeways, churchways, or pavements, which now are or may hereafter be paved, repaired, or cleansed, broken up or diverted, under or by virtue of the provisions of any local or personal act or acts of Parliament" (a).

And therefore a certificate of justices for diverting a highway under s. 85 is bad, when the highway in question is within a part of a parish constituted a district by a local improvement act. And, secondly, even if the justices had power to make any such certificate, it could only have been upon the application of the surveyor under the authority of the inhabitants of the district comprised in such local act. (*Wright v. Frant, Overseers of*, 32 L. J. M. C. 204.) But this section only prevents the surveyor of the highways from interfering in the repair of roads which by local acts are directed to be repaired under other superintendence, it does not exempt property which is under such superintendence from the liability to contribute to the highway rate. (*Reg. v. Paynter*, 13 Q. B. 399.)

By sect. 114. Nothing in this act contained shall extend to affect any of the rights or privileges of the Universities of Oxford or Cambridge.

By sect. 115. Nor the rights and liberties of the city of London.

XXX. Highways into Districts—Formation of.

25 & 26 Vict. c. 61. By 25 & 26 Vict. c. 61, "An Act for the better management of Highways in England," after reciting that it is expedient to amend the law relating to highways in England, enacts:—

PRELIMINARY.

Limits of act.

Definition of "County" and "Borough."

Sect. 1. This act shall not extend to Scotland or Ireland.

Sect. 2. The word "county" in this act shall not include a "county of a city" or "a county of a town," but where a county, as hereinbefore defined, is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county; and for the purposes of this act all liberties and franchises, except the liberty of Saint Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by 2 or more counties, then as forming part of that county with which they have the longest common boundary; the word "borough" shall mean a borough as defined by the 5 & 6 Will. 4, c. 76, "for the regulation of municipal corporations in England and Wales," or any place to which the provisions of the said act have been or shall hereafter have been extended (b).

Definition of "Parish," "Highway District," and "Highway Board."

Sect. 3. The word "parish" shall include any place maintaining its own highways; the expressions "highway district" and "highway board" shall refer only to highway districts formed and highway boards constituted in pursuance of this act.

Definition of "Principal Act" and "Highway Acts."

Sect. 4. The 5 & 6 Will. 4, c. 50, intituled "An Act to consolidate and amend the Laws relating to Highways in that part of Great

(a) Nor to any highways included in any district formed in pursuance of 25 & 26 Vict. c. 61, and which are maintained under any local act of

parliament. As to highways under inclosure acts, see "*Inclosures*."

(b) See "*Corporation, Municipal*."

Britain called England," is hereinafter distinguished as "the principal act;" and this act and the principal act, and the other acts amending the principal act (a), are hereinafter included under the expression "the highway acts."

30. *Highways into districts—Formation of.*

This act was amended by the 27 & 28 Vict. c. 101, which enacts:—

27 & 28 Vict. c. 101.

Preliminary.

Preliminary.

Sect. 1. The acts hereinafter mentioned may be cited for all purposes by the short titles following; that is to say,

Short titles of highway acts.

The act of the 5 & 6 Will. 4, c. 50, and intituled "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England," by the short title of the "Highway Act, 1835."

The said act 25 & 26 Vict. c. 61, by the short title of the "Highway Act, 1862."

This act by the short title of the "Highway Act, 1864."

All the above-mentioned acts and any acts passed or to be passed amending the same shall be included under the short title of "The Highway Acts."

Sect. 2. This act, so far as is consistent with the tenor thereof, shall be construed as one with the "Highway Act, 1862."

This act shall be construed with 25 & 26 Vict. c. 61.

Sect. 3. "Poor Law Parish" shall mean a place that separately maintains its own poor:

Definition of "Poor Law Parish," "Highway Parish," "Highway Rate," and "County."

"Highway Parish" shall mean a place that after the constitution of a highway district separately maintains its own highways, and is entitled to return a waywarden or waywardens to the highway board of the district:

"Highway Rate" shall include any rate, whether poor rate or not, out of the produce of which monies are payable in satisfaction of precepts of a highway board:

"County" shall include any division of a county that has a separate county treasurer.

FORMATION OF HIGHWAY DISTRICTS.

Sect. 5. Any 5 or more justices of a county may by writing under their hands require the clerk of the peace to add to or send with the notice required by law to be given of the holding of courts of general or quarter sessions a notice in the form marked (A.) (b) in the schedule, or as near thereto as circumstances admit, that at the court therein mentioned a proposal will be made to the justices to divide the county or some part thereof into highway districts, or to constitute the whole or some part thereof a highway district, and also require the clerk of the peace to send by post in a prepaid letter notices in the aforesaid form to the churchwardens or overseers of every parish mentioned in the said notice; and upon such requisition being complied with the justices assembled at the court of general or quarter sessions mentioned in the notice may entertain such proposal, and make a provisional order dividing their county or some part thereof into highway districts, or constituting the whole or some part of their county a highway district, for the more convenient management of highways, but such order shall not be of any validity unless it be confirmed by a final order of the justices assembled at some subsequent court of

25 & 26 Vict. c. 61. Power to justices, in general or quarter sessions assembled, to issue provisional orders for forming highway districts.

(a) These acts will be found under tit. "Highway."

(b) Notice is hereby given, that at the general or quarter sessions to be held on the day of , a proposal will be made to divide the county of Lincoln into highway districts [or to

divide the parts of Holland in the county of Lincoln into highway districts, or to constitute the county of Rutland a highway district, or to constitute the parishes of Alford, Castle Carey, and Lovington, in the county of Somerset, a highway district].

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101. Part of s. 5 of Highway Act of 1862 repealed, and other provisions enacted.

general or quarter sessions: provided (a) that when it is proposed that only part of a county shall be divided into a highway district, not less than 2 out of the 5 justices making such proposal shall be resident in the said district.

By 27 & 28 Vict. c. 101, s. 6, there shall be repealed so much of s. 5 of the Highway Act, 1862, as provides that, "when it is proposed that only part of a county shall be divided into a highway district, not less than 2 out of the 5 justices making such proposal shall be resident in the said district;" and in lieu thereof be it enacted, that when it is proposed that only part of a county is to be constituted a highway district, not less than 2 out of the 5 justices making such proposal shall be resident in the said district, or acting in the petty sessional division in which such district or some part thereof is situate.

A parish will not be exempted from being included in a highway district, although its highways are under the superintendence of a highway board, under 5 & 6 Will. 4, c. 50, s. 18, unless such board be legally constituted. (*Reg. v. How*, 9 L. T. N. S. 385.)

25 & 26 Vict. c. 61. Regulations as to the making, &c. of orders of justices,

Sect. 6. The following regulations shall be enacted as to the making, confirmation, and approval of the orders of justices for forming highway districts:

1. The justices making a provisional order under this act shall appoint some subsequent court of general or quarter sessions, to be held within a period of not more than 6 months, for the taking into consideration the confirmation of the provisional order by a final order:
2. The clerk of the peace shall add to or send with the notice required by law to be given of the holding of courts of general or quarter sessions a notice in the form marked (B.) (b) in the schedule hereto, or as near thereto as circumstances admit, of the appointment so made by the justices in relation to the confirmation of the provisional order:
3. The justices assembled at the appointed court of general or quarter sessions may make a further order quashing the provisional order, or confirming it with or without variations, or respiting the consideration of such provisional order to some subsequent court of general or quarter sessions, provided—
Firstly, that where the variations made extend to altering the parishes constituting any highway district or districts as formed in the provisional order, the order shall be deemed to be provisional only, and shall be dealt with accordingly:
Secondly, that where a respite is made to any subsequent general or quarter sessions, the clerk of the peace shall give notice of such respite in manner in which he is required to give notice in respect of sessions at which a provisional or final order is proposed to be made:
4. The provisional order shall state the parishes to be united in each district, the name by which the district is to be known, and the number of waywardens (such number to be at least 1) which each parish is to elect: (c)

(a) This proviso is repealed by 27 & 28 Vict. c. 101, s. 6.

(b) Form (B.) (25 & 26 Vict. c. 61). Whereas at a court of general or quarter sessions, held on the day of last, a provisional order was made in the words following; that is to say, [*here set out the provisional*

order].

Notice is hereby given, that the confirmation of the said provisional order by a final order will be taken into consideration by the justices at a court of general or quarter sessions to be held on the day of next.

(c) A provisional order made by

By 27 & 28 Vict. c. 101, s. 10, the paragraph No. 5 in the 6th sect. of the Highway Act, 1862, shall be repealed, and in lieu thereof be it enacted,

The first meeting of the highway board after the formation of a district shall be held at such time as may be appointed by the provisional or final order of the justices, so that the time appointed be not more than 7 days after the expiration of the time limited by law for the election of waywardens, or, in the case of a special day being appointed for such election as hereinafter mentioned, be not more than 21 days after that day.

The day appointed for the first meeting of the board shall for all the purposes of the highway acts be deemed to be the day of the formation of the district; and the surveyor for the time being of every parish within the district shall continue in office until 7 days after the appointment of the district surveyor, and no longer.

A final order of sessions made in April, 1865 (confirming a provisional order of October, 1864), which ordered that the first meeting of the highway board to be elected by the highway district, should be held on the first Thursday after the 25th March, 1866, was held good in *Reg. v. JJs. of Lindsey*, 1 L. R. Q. B. 68, because the sessions were not bound to appoint a day after the expiration of the time limited by law for the election of waywardens, though as a matter of practice it would have been better to postpone the day to 1 of the 7 days after such limited time.

6. Notice of the provisional and final orders shall as soon as possible after the making thereof be given by the clerk of the peace, by publishing a copy in the *London Gazette* and in 1 or more newspapers circulating in the county, or if the whole county is not affected by such order in 1 or more newspapers circulating in the district affected by such orders, and by sending a copy by post in a prepaid letter to the overseers of every parish within the proposed highway district, and there shall be added to the notice of the provisional order the date of the sessions at which the confirmation of such order will be considered. (a)

Sect. 7. The following restrictions will be imposed with respect to the formation of highway districts in pursuance of this act:

Firstly, there shall not be included in any highway district formed in pursuance of this act any of the following places; that is to say,

Any part of a county to which the act 23 & 24 Vict. c. 68, and intituled "An Act for the better Management and Control of the Highways in South Wales," extends:

The Isle of Wight:

Any district constituted under the Public Health Act, 1848, and the Local Government Act, 1858, or either of such acts:

Any parish or place the highways of which are at the time of the passing of this act, or may be within 6 months afterwards, under the superintendence of a board established in pursuance of s. 18 of the principal act, unless with the consent of such board:

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Part of s. 6 of Highway Act of 1862, as to meetings of board, repealed, and other provisions enacted.

25 & 26 Vict. c. 61, s. 6 continued.

Restrictions on formation of highway districts.

justices under this act whereby E. and several other places were constituted a highway district, and one waywarden was to be elected for each place respectively, was held bad, because the fact that E. contained 3 hamlets, each separately maintaining its own highways, was not brought to

the knowledge of the justices making the order, and the order contained no provision for combining the 3 hamlets into one place. (*R. v. Justices of West Riding*, 13 W. R. 966.)

(a) See 27 & 28 Vict. c. 101, s. 12, p. 1105.

30. *Highways
into districts—
Formation of.*

25 & 26 Vt. c. 61.

Any parish or place within the limits of the metropolis as defined by the 18 & 19 Vict. c. 120, and intituled "An Act for the better Local Management of the Metropolis :

Any parish or place, or part of a parish or place, the highways whereof are maintained under the provisions of any (a) local act of parliament :

Secondly, there shall not be included in any highway district formed in pursuance of this act any parish or place, or part of a parish or place, within the limits of a borough without the consent, firstly, of the council of such borough, and, secondly, of the vestry of the parish which, or part of which, is proposed to be included :

Thirdly, where any parish separately maintaining its own highways is situate in more than 1 county the whole of such parish shall, for the purposes of this act, be deemed to be within the county within which the church of such parish, or (if there be no church) the greater part of such parish, is situate :

Lastly, where a parish separately maintaining its own poor is divided into townships, tithings, hamlets, or places, each of which separately maintains its own highways, it shall be lawful for the justices, if they think fit, in their provisional order to combine such townships, tithings, hamlets, and places, and to declare that no separate waywardens shall be elected for such townships, tithings, hamlets, and places, and that such parish shall be subject to the same liabilities in respect of all the highways within it which were before maintained by such townships, tithings, hamlets, and places separately, as if all their several liabilities had attached to the whole parish ; and that a waywarden or waywardens shall be elected for such parish as a whole ; and where such order is made, all the provisions herein contained in relation to parishes within the meaning of this act shall be applicable to the parish formed by such combination.

7 & 28 Vict. c. 101.

Amendment of
s. 7 of Highway
Act of 1862 as to
combination of
townships, &c.

27 & 28 Vict. c. 101, sec. 7. The power given by s. 7 of " the Highway Act, 1862," of combining townships, tithings, hamlets, or places separately maintaining their own highways, and situate in a poor law parish, shall extend to combining any two or more of such townships, tithings, hamlets, or places, and any combination so formed shall for all the purposes of the highway acts be deemed to be a highway parish.

Where a township, tithing, hamlet, or other place separately maintaining its own highways is situate in 2 or more poor law parishes, each part of such township, tithing, hamlet, or other place may be combined with the parish in which that part is situate.

The justices may, by their provisional and final order, declare that any poor law parish within their jurisdiction, or residue of a poor law parish, after excluding such part, if any, as is prohibited by the " Highway Act, 1862," either wholly or without the consent of the governing body, from being included in the highway district, shall henceforward become a highway parish ; and upon such declaration being made such poor law parish, or residue of a poor law parish, shall thereafter be a highway parish entitled to return a waywarden or waywardens to the highway board of the district in which it is included ; and no rate shall be separately levied for the maintenance of the highways, and no separate waywardens be elected in any township, tithing, hamlet, or other subdivision of such poor law parish or residue of a poor law parish.

(a) This term " local act " does not include turnpike acts, 26 & 27 Vict. c. 94, s. 1. *Post*, p. 1111.

Where, previously to the passing of the provisional order forming a highway district, no surveyors or waywardens have been elected within any highway parish in that district, and where the mode of electing a waywarden or waywardens in such parish is not provided by this act or the "Highway Act, 1862," the justices shall, by their provisional and final orders constituting the district, or by any subsequent provisional and final orders, make provisions for the annual election of a waywarden or waywardens for such parish.

Sect. 8. Where a parish or place separately maintaining its own highways is situate partly within and partly without the limits of a borough, the justices may by their provisional and final orders include in a highway district the outlying part of such parish or place; and where the outlying part of a parish or place situate as aforesaid has been, previously to the passing of this act, or may be hereafter, included in a highway district, each part of such parish or place shall for all the purposes of the highway act be deemed to be a place separately maintaining its own highways; and a waywarden or waywardens shall be elected by the ratepayers in each such part at such time and in such manner as may be provided by the said justices.

Sect. 9. The justices in petty sessions may appoint overseers, or otherwise deal with any extra-parochial place with a view to constituting it a highway parish or part of a highway parish, in the same manner as the justices may deal with such place for the purpose of constituting it a place or part of a place maintaining its own poor, in pursuance of the powers for that purpose given by the 20 Vict. c. 19.

Sect. 11. In forming a highway district under the "Highway Act, 1862," the justices may, for the purpose of avoiding delay in bringing the act into operation, appoint by their final order a day on which the first election of waywardens as members of the highway board is to take place in the district.

On the day appointed for the election waywardens shall be elected in every parish in the district entitled to elect such officers by the same persons and in the same manner by and in which waywardens are elected under the "Highway Act, 1862," and all the provisions of the highway acts relating to the qualifications of surveyors or waywardens, and to the appointment of surveyors and waywardens by justices in the event of no election taking place, shall apply accordingly; but the waywardens elected under this section shall continue in office only until the time at which the next annual election of surveyors would have taken place in the several parishes of the district if the same had not been constituted a highway district, and at that time new waywardens shall be elected in manner provided by the highway acts.

Sect. 13. Contiguous places situate in different counties and places situate partly in one county and partly in another county or counties shall, for the purpose of being united in one highway district, be deemed to be subject to the jurisdiction of the justices of any county, who may make a provisional and final order constituting them a highway district, in the same manner as if all such places or parts of places were situate in such last-mentioned county; subject to this proviso, that the provisional and final orders of the justices of the said county shall be of no validity unless provisional and final orders to the same effect are passed either concurrently with or subsequently to the first-mentioned provisional and final orders by the justices of every other county in which any of the said places or parts of places are situate.

Sect. 14. The approval of the justices of any county to any provisional order made by the justices of another county affecting any place in such first-mentioned county in pursuance of s. 39 of the

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Provision for places partly within and partly without a borough.

Power of justices as to extra-parochial places.

Power to justices to bring Highway Act into operation on a particular day.

As to union of parishes in different counties.

Amendment of s. 39 of Highway Act, 1862.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

As to the costs of parishes applying to be removed from one district to another.

As to validity of order of justices.

Extent of powers of justices.

Definition of "provisional and final orders."

25 & 26 Vict. c. 61. Rules as to objection and evidence, and publication of orders.

27 & 28 Vict. c. 101. Amendment of sect. 6 of Highway Act of 1862.

"Highway Act, 1862," shall be testified by provisional and final orders of the justices of the said first-mentioned county.

The powers conferred on justices by s. 39 of the "Highway Act, 1862," shall be deemed to extend to the separation of any townships, tithings, hamlets, or places separately maintaining their own highways which may have been consolidated by any previous order of the justices, and to an alteration in the number of waywardens of any parish.

Sect. 15. Where, after the formation of a highway district, an application is made by any parish in that district to any court of general or quarter sessions, praying that the said parish may be removed from that district, all costs incidental to or consequential on such application and the removal of the said parish shall, unless the court otherwise directs, be paid by the parish that has made the application in such manner as the said court may direct. The amount of such costs shall be raised in the same manner as if they were expenses incurred in maintaining and keeping in repair the highways of that parish.

Sect. 16. No order of the justices forming a highway district, whether made before or after the passing of this act, shall be void by reason that it includes in such district a place which the justices are not entitled to include under the provisions of this act or the "Highways Act, 1862," or one of such acts; and any order containing such prohibited place shall be construed and take effect as if that place had not been mentioned therein.

All expenses properly incurred by the justices of any county in maintaining the validity of any provisional or final order made by them shall be payable out of the county rate of that county.

Sect. 17. All powers and jurisdictions vested in justices by the "Highway Act, 1862," and this act, or either of such acts, may from time to time be exercised in relation to highway districts, highway boards, and highway parishes already formed, as well as upon the occasion of forming new highway districts, boards, or parishes; and where an alteration is made in part only of a highway district the residue of that district shall not be affected thereby, but shall continue subject to the highway acts in the same manner as if no such alteration had been made.

Sect. 18. The expression "provisional and final order," as used in this act, shall mean a provisional and final order passed and published in manner provided by this act (a) and the "Highway Act, 1862" (b), with the necessary variations as to notices and otherwise.

LEGAL OBJECTIONS TO FORMATION OF DISTRICT. .

Sect. 8. No objection shall be made at any trial or in any legal proceeding to the validity of any orders or proceedings relating to the formation of a highway district, after the expiration of 3 calendar months from the date of the publication in the Gazette of the order under which the district is formed; and the production of a copy of the *London Gazette* containing a copy of the order of justices forming a highway district shall be receivable in all courts of justice, and in all legal proceedings, as evidence of the formation of the district and of the matters in the said order mentioned.

AMENDMENTS AS TO ORDERS OF JUSTICES.

27 & 28 Vict. c. 101, sect. 4. Where more highway districts than one are comprised in any order of justices, whether provisional or final, and whether made before or after the passing of this act, the formation of each of such districts is to be deemed independent of the formation

(a) See sect. 12, p. 1105.

(b) Sect. 6, *ante*, p. 1098.

of any other district, and the order shall for all purposes be construed and take effect as if a separate order had been made in respect of each district; and any variation in a provisional order altering the parishes in any one or more districts comprised in that order shall make that order provisional only as to the particular district or districts in which the alterations are made, and not as to any other district or districts included in the same order.

Sect. 5. Any parish, township, tithing, hamlet, or other place having a known legal boundary in which there are no highways repairable at the expense of the place, or in which the highways are repaired at the expense of any person, body politic or corporate, by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever than out of a highway rate or other general rate, shall, for the purposes of the highway acts, be deemed to be a place separately maintaining its own highways.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Certain places to be deemed places separately maintaining their own highways.

Where part of a parish is, in pursuance of the Local Government Act, 1858, Amendment Act, 1861, s. 9, treated as forming part of a district constituted under the Local Government Act, 1858, for all purposes connected with the repair of highways and the payment of highway rates, but for no other purpose, such part shall, for the purposes of the "Highway Act, 1862," and this act, be deemed to be a place separately maintaining its own highways, and capable of being included in a highway district, without requiring the consent of the local board to be given.

Where the highways of one part of a parish are, in pursuance of a private act of parliament, repairable out of a different rate from that out of which the highways of the other part are repairable, each of such parts shall, for the purposes of the highway acts, be deemed to be a place separately maintaining its own highways.

CONSTITUTION OF HIGHWAY BOARD.

25 & 26 Vict. c. 61, s. 9, enacts, with respect to the constitution of the highway board in each highway district, the provisions following; (that is to say,)

25 & 26 Vict. c. 61.
Constitution of highway board.

- (1.) The highway board shall consist of the waywardens elected in the several places within the district, in manner hereinafter mentioned (a), and of the justices acting for the county and residing within the district:
- (2.) The board shall be a body corporate, by the name of the highway board of the district to which it belongs, having a perpetual succession and a common seal, with a power to acquire and hold lands for the purposes of the highway acts, without any licence in mortmain:
- (3.) No act or proceeding of the board shall be questioned on account of any vacancy or vacancies in their body:
- (4.) No defect in the qualification or election of any person or persons acting as members or member of the board or committee of a board shall be deemed to vitiate any proceedings of such board in which he or they have taken part in cases where the majority of members, parties to such proceedings, are duly entitled to act:
- (5.) Any minute made of proceedings at meetings of the board or of committees of the board if signed by any person purporting to be the chairman of the board or committee of the board, either at the meeting of the board or committee of the board at which such proceedings took place, or at the next ensuing meeting of the board or committee of the board, shall be receivable in

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into districts—
Formation of.*

25 & 26 Vict. c. 61.

evidence in all legal proceedings without further proof; and until the contrary is proved every meeting of the board or committee of the board in respect of the proceedings of which minutes have been so made shall be deemed to have been duly convened and held, and all the members thereof to have been duly qualified :

- (6.) No member of a board, by being party to, or executing in his capacity of member, any contract or other instrument on behalf of the board, or otherwise lawfully exercising any of the powers given to the board, shall be subject to be tried or prosecuted, either individually or with others, by any person whomsoever; and the bodies or goods or lands of the members shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, tried, or executed by them, or by reason of any other lawful act done by them in execution of any of the powers of the board; and the members of the board may apply any monies in their hands for the purpose of indemnifying themselves against any losses, costs, or damages they may incur in execution of the powers granted to them :

- (7.) The rules contained in the schedule hereto with respect to the proceedings of highway boards, and the other matters therein contained, shall be observed in the same manner as if such rules were enacted in the body of this act.

27 & 28 Vict. c. 101.
Qualification of
ex officio way-
wardens.

27 & 28 Vict. c. 101, sect. 29. A justice of the peace acting for the county in which a highway district is situate, if he is resident in any place which is prohibited either altogether or without the consent of the local authority from being included in a highway district by the 7th section of the "Highway Act of 1862," and which is surrounded by or adjoins in any part such highway district, shall, by virtue of his office, be a member of the highway board of such district, subject to this qualification, that if in pursuance of this section any justice of the peace would be entitled to be a member of two or more highway boards in the same county, he shall, by letter under his hand, addressed to the clerk of the highway board for which he elects to act, and by him to be transmitted to the clerk of the peace of the county, declare of which of the said highway boards he elects to be a member, and having made that election he shall be bound thereby, and shall not be entitled by virtue of his office of justice to be a member of any other of the said boards.

ELECTION OF WAYWARDENS.

25 & 26 Vict. c. 61.
Election of way-
wardens.

Sect. 10. The following regulations shall be observed with respect to the election of waywardens in highway districts :

In every parish forming part of a highway district there shall be elected every year for the year next ensuing a waywarden, or such number of waywardens as may be determined by order of the justices :

Such waywarden or waywardens shall be elected in every parish forming part of a highway district at the meeting (a) and time

(a) By 27 & 28 Vict. c. 101, s. 31, any meeting of ratepayers for the election of a waywarden is to be deemed included in the expression "inhabitants in vestry assembled," as used in the highway acts.

A final order of quarter sessions made in April, 1865 (confirming a provisional order of October, 1864),

which ordered that the first meeting of the highway board to be elected for the highway district should be held on the first Thursday after the 25th of March, 1866, is good; because the sessions were not bound to appoint a day after the expiration of the time limited by law for the election of waywarden, though, as a matter of

and in the manner, and subject to the same qualification and the same power of appointment in the justices, in the event of no election taking place, or in the event of a vacancy at, in, and subject to which a person or persons to serve the office of surveyor would have been chosen or appointed if this act had not passed:

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.

The justices shall in their provisional order make provision for the election of a waywarden or waywardens in places where no surveyor or surveyors were elected previously to the place forming part of a highway district:

A waywarden shall continue to act until his successor is appointed, and shall be re-eligible.

By the 26 & 27 Vict. c. 61, after reciting that it is expedient that waywardens, appointed under 25 & 26 Vict. c. 61, should be prevented from contracting for any works to be executed under the said act within their own districts, enacts:

Sect. 1. No such waywarden shall directly or indirectly, in his own name or in the name of any other person or persons, contract for the repair of any road, or for any other work to be executed under the provisions of the said recited act within the parish for which he is elected waywarden, or within any other parish in the same district, under the pain of forfeiting the sum of 10*l.*, with full costs of suit, to any person or persons who shall sue for the same by action for debt in any county court within the jurisdiction of which the parish in which the roads to be repaired, or the other work so contracted for, is situate.

Penalty on waywardens being concerned in contracts within their own districts (a).

Sect. 2. It shall not be lawful for any highway board to pay knowingly for any repair or work so contracted for, and any money paid by any board under any such contract shall be recoverable by them with full costs from the person or persons to whom the same shall have been paid, by action of debt in any of her majesty's courts of record at Westminster, if the same shall amount to above 50*l.*, or in any county court as aforesaid if below that amount, and the balance so recovered, after paying all expenses, shall be placed to the credit of the district fund.

Highway boards not liable to pay for any work so contracted for.

Sect. 3. This act shall be construed with and held to be part of the said recited act for the better management of highways in England.

This act to be as part of recited act.

27 & 28 Vict. c. 101, s. 20. Whereas doubts are entertained whether sect. 46 of the Highway Act of 1835 (a), applies to a highway district, be it enacted, that that section shall not apply to the highway board of any highway district or to any parish within any highway district.

27 & 28 Vict. c. 101.

Power to waywardens to contract for supply or cartage of materials.

Notwithstanding anything contained in the 26 & 27 Vict. c. 61, or in any other act, any waywarden may contract for the supply or cartage of materials within the parish for which he is waywarden, with the licence of 2 justices assembled at petty sessions, such licence to be granted on the application of the clerk of the highway board, who must be authorised to make such application by a resolution of his board assembled at a meeting of which notice has been given.

27 & 28 Vict. c. 101.

Sect. 12. (b) No order of the justices forming a highway district shall be invalidated by reason of its not being published in the *London Gazette*, and where any reference is made in any section of the "Highway Act, 1862," to the date of the publication in the gazette of the

Publication of orders in Gazette made permissive.

practice, it would have been better to have postponed the day to one of the seven days after such limited time.

(R. v. *Justices of Lindsey*, L. R. 1

Q. B. 68.)

(a) See the sections, *ante*, p. 1005.

(b) This section ought to have been inserted on page 1099.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Appointment and vote of waywardens.

order, such section shall be construed as if the date of the making of the final order, under which the district is formed were substituted for "the date of the publication in the gazette of the order under which the district is formed;" and any copy of the provisional or final order of the justices forming a highway district, certified under the hand of the clerk of the peace to be a true copy, shall be receivable in all courts of justice, and in all legal proceedings as evidence of the formation of the district and of the matters in the said order mentioned. See 25 & 26 Vict. c. 61. s. 6, paragraph (6), p. 1099.

Sect. 19. Every waywarden, before taking his seat as a member of a highway board, shall produce a certificate of his having been duly elected or appointed a waywarden, and such certificate shall, in the case of an elected waywarden, be signed by the chairman of the vestry or other meeting at which he was elected; and in the case of a waywarden appointed by justices, be signed by the justices making the appointment.

A waywarden may sit as such for more places than one, but he shall be entitled to one vote only as waywarden.

25 & 26 Vict. c. 61.

Consequences of establishment of highway board.

CONSEQUENCES OF FORMATION OF HIGHWAY DISTRICT.

Sect. 11. At and after the first meeting in any highway district of the board of such district the following consequences shall ensue:—

All such property, real and personal, including all interests, easements, and rights, in, to, and out of property, real and personal, and including things in action, as belong to or are vested in, or would but for this act have belonged to or been vested in, any surveyor or surveyors, of any parish forming part of a district, shall pass to and vest in the highway board of that district for all the estate and interest of such surveyor or surveyors as aforesaid, but subject to all debts and liabilities affecting the same:

All debts and liabilities incurred in respect of any property transferred to the highway board may be enforced against the board to the extent of the property transferred:

All such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying highway rates), as are vested in or attached to, or would but for this act have become vested in or attached to any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board:

All property by this act transferred to the board shall be held by them upon trust for the several parishes or places now maintaining their own highways within their district to which such property belongs, or for the benefit of which it was held previously to the formation of the district.

APPOINTMENT AND DUTIES OF OFFICERS.

Power to highway board to appoint officers.

Sect. 12. The highway board of a district shall, at their first meeting or at some adjournment thereof, by writing under their seal, appoint a treasurer, clerk, and district surveyor; they may also at any meeting, if they think fit, appoint an assistant surveyor; they may from time to time remove any of such officers, and appoint others in the room of such as may be so removed, or as may die or resign; they may also, out of any monies in their hands, pay such salaries as they think reasonable to the clerk and district and assistant surveyor, and to the treasurer, if they think necessary: Provided that before the treasurer enter upon his office the board shall take sufficient security from him for the due performance of the duties of his office

but no appointment, except the first, to any of the offices specified in this section, shall be made unless notice in writing has been sent to every member of the board.

Sect. 13. Not more than one office of treasurer, clerk, and district or assistant surveyor of the same highway board shall be held by the same person, or by persons in partnership with each other, or by persons in the relation of employer and clerk, agent, or servant, one of the other, or of the partner of either of them; and if any person accepts or holds the office of treasurer, clerk, or district or assistant surveyor, contrary to this provision, he shall be liable to a penalty not exceeding 50*l*.

Sect. 14. The treasurer of each highway board shall receive, and hold to the account of such board, all monies paid to or for the use of such board, and shall make payments thereout under orders of such board, and shall once in every 3 months, on * or at such days or times as the board may direct, or oftener if required by the board, make up an account of all monies received and paid by him, and deliver the same to the clerk of the board.

Sect. 15. The clerk of every highway board shall in person, or by such deputy as may be allowed by such board, attend all meetings of the board, and shall conduct the correspondence thereof, and enter and keep, in books to be provided for the purpose, notes, minutes, or copies, as the case may require, of the meetings, acts, orders, resolutions, proceedings, and correspondence of such board, and shall keep all books, papers, and documents committed to his charge, and shall perform all such other duties as the board may direct.

Sect. 16. The district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties by this act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties, and the assistant surveyor, if any, shall perform such duties as the board may require, under the direction of the district surveyor.

27 & 28 Vict. c. 101, s. 30. The appointment of any officer of a highway board may be made by a minute of the board signed by the chairman and countersigned by the clerk of the board, and any appointment so made shall be as valid as if it were made under the seal of the board.

27 & 28 Vict. c. 101, s. 31. The power of appointing paid collectors of highway rates with the consent of the inhabitants in vestry assembled, which is vested in a surveyor by the "Highway Act, 1835," and all the provisions of that act relating to such appointment, shall be vested in and extend to any waywarden required to levy rates in pursuance of the "Highway Act, 1862," and this act, or either of such acts; and for the purposes of this act any meeting of ratepayers entitled to elect a waywarden or waywardens shall be deemed to be included under the expression "inhabitants in vestry assembled," as used in this section, and the highway acts. See the sections, *ante*, p. 1027.

27 & 28 Vict. c. 101, s. 45. If the highway board of a district make default in appointing a treasurer, clerk, and district surveyor, or any of such officers, in pursuance of the "Highway Act, 1862," within 3 months after the day fixed by the justices for the holding of the first meeting of the board, or within 3 months after a vacancy occurring in any of the said offices, the justices in general or quarter sessions assembled may, if they think fit, appoint a person to any of the said offices in respect of which the default has been made, and may fix the salary to be paid to the officer appointed; and any such appointment shall take effect and salary be recoverable in the same manner as if the officer appointed by the justices had been appointed by the highway board of the district; and it shall not be lawful for such board,

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61. Two offices not to be held by the same person.

Duties of treasurer.

Duties of clerk.

Duties of district surveyor.

27 & 28 Vict. c. 101. Appointment of officers of board.

Power to appoint paid collectors of highway rates.

In case of default of highway board appointing officer.

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.

Board to maintain highways.

without the consent of the said justices, to remove any officer appointed by them under this section, or to lessen his salary within one year from the date of his appointment.

WORKS AND DUTIES OF BOARD.

Sect. 17. The highway board shall maintain in good repair the highways within their district, and shall, subject to the provisions of this act, as respects the highways in each parish within their district, perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor of such parish would have performed, had, and been liable to if this act had not passed. It shall be the duty of the district surveyor to submit to the board at their first meeting in every year an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district of the board, and to deliver a copy of such estimate as approved or modified by the board so far as the same relates to each parish to the waywarden of such parish.

Proceedings where roads are out of repair.

Sect. 18. Where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice shall issue two summonses (*a*), the one addressed to the highway board and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions, in the summons mentioned, to be held in the division where such highway is situate; and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway, and report to them on its state at such other petty sessions, or fix a day, previous to such petty sessions, at which two or more of such justices will themselves attend to view the highway.

At such last-mentioned petty sessions, if the justices are satisfied, either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board limiting a time for the repair of the highway complained of; and if such highway is not put in complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be removed into the court of Queen's Bench, in the same manner as if it were an order of general or quarter sessions, and be enforced accordingly.

All expenses so directed to be paid by the board in respect of the repairs of any highway shall be deemed to be expenses incurred by the board in repairing such highway, and shall be recovered accordingly.

The highway board may appear before the justices at petty sessions by their district surveyor or clerk, or any member of the board.

27 & 28 Vict. c. 101.
Provisions for

27 & 28 Vict. c. 101, s. 21. When any highway board consider any highway unnecessary for public use, they may direct the district sur-

(*a*) See 27 & 28 Vict. c. 101, s. 26, or order of the highway board, *post*,
as to service of summons, precept, p. 1118.

veyor to apply to 2 justices to view the same, and thereupon the like proceedings shall be had as where application is made under the "Highway Act, 1835," (a) to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment, such variation shall be made in any notice, certificate, or other matter preliminary to the making of such order as the nature of the case may require: Provided, that if at any time thereafter, upon application of any person interested in the maintenance of such highway, after one month's previous notice in writing thereof to the clerk of the highway board for the district in which such highway is situated, it appear to any court of general or quarter sessions of the peace that from any change of circumstances since the time of the making of any such order as aforesaid under which the liability of the parish to repair such highway has ceased the same has become of public use, and ought to be kept in repair by the parish, they may direct that the liability of the parish to repair the same shall revive from and after such day as they may name in their order, and such liability shall revive accordingly as if the first-mentioned order had not been made; and the said court may by their order direct the expenses of and incident to such application to be paid as they may see fit.

Sect. 22. The highway board of any district may from time to time contract for any time not exceeding 3 years with any person or body of persons, corporate or unincorporate, to repair any highways, turnpike roads, or roads over county or other bridges, or any part thereof, for the repairing of which such persons or body of persons are liable; and any persons or body of persons liable to repair any roads may contract with the highway board for the repairing any highways, inclusive as aforesaid, or any part thereof, which the highway board is liable to make or repair; and the money payable under any contract made in pursuance of this section shall be raised in the same manner and be paid out of the same rates as would have been applicable to defray the expenses of the repair of such highways if no contract had been made in respect thereto.

Sect. 47. A highway board may make such improvements as are hereinafter mentioned in the highways within their jurisdiction, and may, with the approval of the justices in general or quarter sessions assembled, borrow money for the purpose of defraying the expenses of such improvements:

Previously to applying for the approval of the justices the highway board shall cause an estimate of the expense of the improvements to be made, and two months at the least before making their application shall give notice of their intention so to do.

The notice shall state the following particulars:

- (1.) The nature of the work, the estimated amount of expense to be incurred, and the sum proposed to be borrowed:
- (2.) The parish or parishes within the district by which the sum borrowed and the interest thereon is to be paid, and in case of more parishes than one being made liable to pay the principal and interest the annual amounts to be contributed by each parish towards the payment thereof:
- (3.) The number of years within which the principal monies borrowed are to be paid off, not exceeding 20 years, and the amount to be set apart in each year for paying off the same:
- (4.) The sessions at which the application is to be made.

Notice shall be given as follows:

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101. discontinuance of maintenance of unnecessary highways.

Highway board may contract to repair highways for the repair of which other parties are liable.

Power of highway board to make improvements and borrow money for the same, but previously to cause an estimate to be made.

30. *Highways
into districts—
Formation of.*

27 & 28 Vict. c. 101.

- (1.) By transmitting a copy to the clerk of the peace for the county or division :
- (2.) By placing a copy of such notice for 3 successive Sundays on the church door of every church of the parish or parishes on behalf of which such works are to be done, or in the case of any place not having a church, in some conspicuous position in such place.

Upon the hearing of the application any person or persons may oppose the approval of the justices being given, and it shall be lawful for the justices to give or withhold their approval, with or without modification, as they think just.

All monies borrowed in pursuance of this act, together with the interest thereon, shall be a first charge on the highway rates of each parish liable to contribute to the payment thereof, after paying the sums due to the highway board on account of the district fund, in the same manner, so far as the creditor is concerned, as if the money had been borrowed on account of each parish alone; and the sums necessary to repay the said borrowed monies, with interest, shall in each such parish be recoverable in the same manner as if they were expenses incurred by the board in keeping in repair the highways of that parish.

But it shall be the duty of the highway board, in case of any one parish paying more than its share of such borrowed money, or of the interest thereon, to make good to that parish the excess so paid out of the rates of the other parishes liable to contribute thereto.

The justices may from time to time make general orders in relation to the mode in which applications are to be made to them for their consent under this act to the borrowing of any monies.

Definition of
improvements.

Sect. 48. The following works shall be deemed to be improvements of highways :

- (1.) The conversion of any road that has not been stoned into a stoned road :
- (2.) The widening of any road, the cutting off the corners in any road where land is required to be purchased for that purpose, the levelling roads, the making any new road, and the building or enlarging bridges :
- (3.) The doing of any other work in respect of highways beyond ordinary repairs essential to placing any existing highway in a proper state of repair.

Power for parishes
and districts to
contribute to
improvements.

Sect. 49. Any parish may, with the consent of its waywarden, contribute to any improvements made in another parish, whether situate or not in the same district, if such first-mentioned parish consider such improvements to be for its benefit; and any highway board may contribute to any improvements made in another district if such improvements are, in the opinion of the highway board of the first-mentioned district, for the benefit of their district. The contribution to be made by one parish to another shall be payable in the same manner as if such contributions were monies due from the contributing parish in respect of expenses incurred in keeping in repair the highways of that parish, and monies contributed by one district to another district shall be payable out of the common fund of the contributing district.

25 & 26 Vict. c. 61.

When obligation
to repair is dis-
puted.

25 & 26 Vict. c. 61, s. 19. When, on the hearing of any such summons respecting the repair of any highway, the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of

such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly.

The court are not empowered by this section to direct the costs of prosecuting an indictment preferred by the justices for non-repair of a road to be paid by the parish, where upon the trial it is found that the road in question is a private way and not a highway. (*Reg. v. Buckland*, 34 *L. J. M. C.* 178.)

The jurisdiction of justices under this section is limited to admitted highways; and justices have no jurisdiction to order an indictment to be preferred where it is *bonâ fide* denied by the parties charged that the road is a highway, and the liability to repair the road if it is a highway is not denied. (*R. v. Justices of Dorset*, *L. R.* 1 *Q. B.* 558.)

By the 26 & 27 Vict. c. 94, s. 1, it is enacted that, whereas doubts are entertained whether highway boards established under the 25 & 26 Vict. c. 61, are liable to contribute to the repair of turnpike roads in pursuance of the 4 & 5 Vict. c. 59, and the acts continuing the same: Be it enacted, that where any turnpike road is situate in a parish that is included in a highway district, an order may be made on the highway board of the district to contribute to the repair of that road under the same circumstances under which an order for the same purpose may be made on the parish surveyor in pursuance of the 4 & 5 Vict. c. 59, as continued as aforesaid; and for the purposes of the said last-mentioned act, the highway board shall be deemed to be substituted for the parish surveyor, and any rate leviable in pursuance of a precept of the board for the rate or assessment levied or to be levied by the said surveyor as in the said act mentioned, and any monies paid by the board for the purposes or in pursuance of the last-mentioned act, shall be deemed to be expenses incurred by the board in respect of the repair of highways in the parish in which the turnpike road is situate for which contribution is required, and "parish," as used in this section, shall mean any place in a highway district that returns a waywarden or waywardens to the board of that district; and it is hereby declared that "local act," as used in 25 & 26 Vict. c. 61, s. 7, does not include turnpike acts.

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.

26 & 27 Vict. c. 94.

For removing doubts as to highway boards established under 25 & 26 Vict. c. 61, being liable to contribute to repair of turnpike roads, in pursuance of 4 & 5 Vict. c. 59, &c.

As to term "Local Act."

AS TO EXPENSES OF BOARD.

27 & 28 Vict. c. 101, s. 32. Sects. 20, 21, 22, 23, and 24 of the "Highway Act, 1862," relating to the expenses of the board, shall be repealed, but such repeal shall not affect any rate made previously to the passing of this act, or any legal proceeding or remedy for enforcing the same.

27 & 28 Vict. c. 101.

Repeal of sections 20, 21, 22, 23, and 24 of Highway Act, 1862.

The salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district, shall be annually charged to a district fund to be contributed by and charged upon the several highway parishes within such district in proportion to the rateable value of the property in each parish, but the expenses of maintaining and keeping in repair the highways of each highway parish within the district, and all other expenses legally payable by the highway board in relation to such parish, including any sums of money that would have been payable out of the highway rates of such parish if the same had not become part of a highway district, except such expenses as are in this act authorised to be charged to the district fund, shall be a separate charge on each parish.

Expenses, how to be charged.

The rateable value of the property in each parish shall be ascertained according to the valuation list or other estimate for the time being in force in such parish for the purposes of the poor rate, or if no such valuation list or estimate be in force, then in such manner

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.
Mode of defraying expenses of the highway board.

as may be determined by the justices in petty sessions, subject to an appeal by any person aggrieved to the next general or quarter sessions.

Sect. 33. For the purpose of obtaining payment from the several highway parishes within their district of the sums to be contributed by them, the highway board shall order precepts to be issued to the waywardens or overseers of the said parishes according to the provisions hereinafter contained, stating the sum to be contributed by each parish, and requiring the officer to whom the precept is addressed, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board.

Where a highway parish is not a parish separately maintaining its own poor, or where in any highway parish it has, for a period of not less than 7 years immediately preceding the passing of the "Highway Act, 1862," been the custom of the surveyor of highways for such parish to levy a highway rate in respect of property not subject by law to be assessed to poor rates, the precept of the highway board shall be addressed to the waywarden of the parish, and in all other cases it shall be addressed to the overseers.

Where the precept is addressed to a waywarden he shall pay the sum thereby required out of a separate rate, and such separate rate shall, in the case of a parish in which for such period aforesaid it has been the custom of the surveyor of highways to levy a highway rate in respect of property not subject by law to be assessed to poor rate, be assessed on and levied from the persons and in respect of the property on, from, and in respect of which the same has been assessed and levied during such period as aforesaid, and in all other cases such rate shall be assessed on and levied from the persons and in respect of the property on, from, and in respect of which a poor rate would be assessable and leviable if the parish of which he is waywarden were a place separately maintaining its own poor.

No rate leviable by a waywarden under this act shall be payable until the same has been published in manner in which rates for the relief of the poor are by law required to be published.

A waywarden shall account to the highway board for the amount of all rates levied by him, and at the expiration of his term of office shall pay any surplus in his hands arising from any rate so levied, above the amount for which the rate was made, to the treasurer of the highway board, to the credit of the parish within which such rate was made, and such surplus shall go in reduction of the next highway rate that may be leviable in such parish.

Where the precept is addressed to the overseers they shall pay the sum thereby required out of a poor rate to be levied by them, or out of any monies in their hands applicable to the relief of the poor.

No contribution required to be paid by any parish at any one time in respect of highway rates shall exceed the sum of 10*d.* in the pound, and the aggregate of contributions required to be paid by any parish in any one year in respect of highway rates shall not exceed the sum of 2*s.* 6*d.* in the pound, except with the consent of four-fifths of the ratepayers of the parish in which such excess may be levied present at a meeting specially called for the purpose, of which 10 days' previous notice has been given by the waywarden of such parish, and then only to such extent as may be determined by such meeting.

All sums of money payable in pursuance of the precepts of a highway board shall, whether they are or not payable by the overseers of the poor, be subject to all charges to which ordinary highway rates are subject by law.

The township of W., within the parish of W., separately maintained its own poor; and G., a hamlet within the township, from time immemorial, had separately maintained its own highways; H. was an occupier of land within the hamlet, the owners and occupiers of which

from time immemorial had been exempt from contributing to the repairs of the highways, by reason of their repairing a particular road in the hamlet; but the occupiers of the land had always been rated to the relief of the poor. The quarter sessions, under the 25 & 26 Vict. c. 61, divided the county into highway districts, and ordered, under s. 7, that "in case any township, which separately maintains its own poor, is divided into any hamlets, &c., each of which separately maintains its own highways, such hamlets, &c., shall be combined, and such township shall be subject to the same liabilities in respect of all the highways within it, which were before maintained by such hamlets, &c., as if all their several liabilities had attached to the whole township." The highway board for the division in which W. was situate, issued their precept, under s. 21 (a), to the overseers of W., requiring them to pay to the treasurer a certain sum, by 2 instalments, towards the repairs, &c., of the highways within the township, including those in the hamlet of G., and the overseers made a rate, headed, "An assessment for the relief of the poor of the township of W., and for other purposes chargeable thereon, at the rate of 1s. in the pound." This rate was made upon every occupier of property liable to be rated to the relief of the poor, including H., the sum charged upon each being one sum at the rate of 1s. in the pound. Of this the amount required for the payment of the first instalment under the precept was 4d. in the pound, and 8d. in the pound for the relief of the poor. H. having appealed against this rate on the ground that being exempt from highway rates, he ought to have been assessed at 8d. only. Held, that the effect of the 25 & 26 Vict. c. 61, coupled with the 5 & 6 Will. 4, c. 50, s. 33, was not to alter the liability to highway maintenance, and that the rate ought to be amended by reducing the appellant's assessment to 8d. in the pound. *Semble*, that the amount assessed for the highways should appear on the face of the rate; so that the ratepayers may see how much is for the maintenance of the poor, and how much for the repair of the highways; and why one occupier, who is liable to both, is charged with the aggregate, and another, who is liable to one only, with that one. (*R. v. Heath and others*, *L. R.* 1 Q. B. 218.)

Sect. 34. All waywardens and overseers to whom precepts of a highway board are hereby directed or authorised to be issued shall within their respective parishes have the same powers, remedies, and privileges, for and in respect of assessing and levying any rates required to be levied for making payments to a highway board, in the case of overseers, as they have in assessing and levying ordinary rates for the relief of the poor, and in the case of waywardens as they would have if the parish of which they are waywardens were a place separately maintaining its own poor, and they were overseers thereof, and the rate to be levied by them were a duly authorised poor rate.

Sect. 35. If any payment required to be made by the overseers or waywardens of any parish of monies due to a highway board is in arrear, it shall be lawful for any justice, on application under the hand of the chairman for the time being or by the clerk of such board, to summon the said overseers or waywardens to show cause at petty sessions why such payment has not been made; and the justices at such petty sessions, after hearing the complaint preferred on behalf of the board, may, if they think fit, cause the amount of payment in arrear, together with the costs occasioned by such arrear, to be levied and recovered from the said overseers or waywardens, or any of them, in like manner as monies assessed for the relief of the poor may be

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Power to levy rates for making payments to highway board.

Mode of enforcing payments to highway boards.

(a) This section was repealed by the 27 & 28 Vict. c. 101, s. 32 (1864), but the principles laid down in this

case are equally applicable to cases of a similar nature that may arise under the act of 1864.

30. *Highways into districts—*
Formation of.

27 & 28 Vict. c. 101.
 Sects. 25, 26, and 30 of Highway Act, 1862, repealed, and other provisions substituted.

levied and recovered, and the amount of such arrear, together with the costs aforesaid, when levied and recovered, to be paid to the said board.

27 & 28 Vict. c. 101, s. 36. Sects. 25, 26, & 30 of the "Highway Act, 1862," shall be repealed, but such repeal shall not affect any proceeding commenced previously to the passing of this act, and instead thereof the following provisions shall be enacted; that is to say,

The accounts of every highway board shall be made up and balanced to the 31st of December in every year.

After the expiration of not less than 14 days nor more than 28 days from the 31st of December, the accounts shall be examined by the board, and signed by the chairman.

The board may, if they think fit, appoint any fit person not being a member or officer of the board to audit their accounts, and may award to him a reasonable compensation, to be paid out of the district fund.

Within 30 days after the signature of the accounts by the chairman the board shall cause a statement showing the receipt and expenditure in respect of each parish, and the apportioned part of expenditure chargeable thereto in respect of the district fund, and such other particulars and in such form as the secretary of state may direct, to be printed, and sent by post or otherwise to each member of the board, and to the overseers of every parish within the district having overseers; and the clerk of the board shall furnish a copy of such statement to any ratepayer or owner of property situate within the district, on his application, and on the payment of a sum of money not exceeding 1d.

The books of account of the board shall at all seasonable times be open to the inspection of any ratepayer of any highway parish within the district of the board.

25 & 26 Vict. c. 61
 Clerk of highway board to transmit statement to secretary of state.

Sect. 27. The clerk to every highway board shall, within such 30 days after the said audit, transmit such statement to one of her majesty's principal secretaries of state; and any such clerk who shall not within the time aforesaid transmit the said statement to the said secretary of state shall for every such offence, upon a summary conviction for the same before 2 justices of the peace, be liable to a penalty not exceeding 10l.

Penalty for neglect.

Abstract of statements to be laid before parliament.

Sect. 28. The secretary of state shall cause the statements so transmitted to be abstracted, and the abstracts thereof to be laid before both houses of parliament, with the other statements in relation to highways required to be abstracted and laid before parliament by the act 12 & 13 Vict. c. 35, *ante*, p. 1020.

Secretary of state may cause form of statement to be prepared.

Sect. 29. It shall be lawful for one of her majesty's principal secretaries of state to cause to be prepared such forms for such statement as he may from time to time deem suitable, and also from time to time to alter the forms for the annual statement prescribed by the 12 & 13 Vict. c. 35, but no statement shall be transmitted under that act concerning parishes wholly within a highway district under this act.

Sect. 30 is repealed by 27 & 28 Vict. c. 101, s. 36.

Officers appointed by highway board to account to them when required.

Sect. 31. All officers appointed by the highway board shall, as often as required by them, render to them or to such persons as they appoint a true, exact, and perfect account in writing under their respective hands, with the proper vouchers, of all monies which they may respectively to the time of rendering such accounts have received and disbursed on account or by reason of their respective offices, and in case any money so received by any such officer remains in his hands, the same shall be paid to the board, or to such person or persons as they in writing under their hands empower to receive the same; and if any officer refuses or wilfully neglects to render and give such account, or to deliver up such vouchers, or for the space of 14 days after being thereunto required by the board refuses or wilfully neglects to give up to them or to such person or persons as they appoint all books, papers,

writings, tools, and things, in his hands, custody, or power relating to the execution of his office, it shall be lawful for any justice of the peace for the county where the officer so making default is or resides, upon application made to him for that purpose by or on behalf of the board, to make inquiry of and concerning any such default as aforesaid in a summary way, as well by the confession of the party as by the testimony of any credible witness or witnesses upon oath, and by warrant under his hand and seal to cause such money as may appear to him to be due and unpaid to be levied by distress and sale of the goods and chattels of such officer, rendering to him the overplus (if any), on demand, after payment of the money remaining due and deducting the charges and expenses of making such distress and sale; and if sufficient distress cannot be found, or if it appears to any such justice in manner aforesaid that any such officer has refused or wilfully neglected to give such account, or to deliver up all books, papers, writings, tools, matters and things in his custody or power relating to the execution of his office, the justice shall commit him to the house of correction or common gaol of the county where such offender is or resides, there to remain without bail until he gives a true and perfect account and verifies the same in manner aforesaid, and produces and delivers up the vouchers relating thereto, and pays the money (if any) remaining in his hands as aforesaid according to the direction of the board, or has compounded with the board for such money and paid such composition (which composition the board are hereby empowered to make and receive), or until he delivers up such books, papers, and writings, tools, matters, and things as aforesaid, or has given satisfaction to the board concerning the same; but no officer who may be committed on account of his not having sufficient goods and chattels as aforesaid shall be detained in prison by virtue of this act for any longer time than 6 calendar months.

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.

SUPPLEMENTAL PROVISIONS.

Sect. 32. Where in pursuance of 20 Vict. c. 19, and intituled "An Act for the Relief of the Poor in Extra-parochial places," any place is declared to be a parish, or where overseers of the poor are appointed for any place, such place shall for the purposes of this act be deemed to be a parish separately maintaining its own highways; and where in pursuance of the same act any place is annexed to any adjoining parish, or to any district in which the relief of the poor is administered under a local act, such place shall for the purposes of this act be deemed to be annexed to such parish or district for the purposes of the maintenance of the highways, as well as for the purposes in the said act mentioned,

Provision as to extra-parochial places.

Sect. 33. Where part of a parish is not contiguous to the parish of which it is a part, such outlying part may at the discretion of the justices be annexed to a district, and, when so annexed, it shall, for all the purposes of the highway acts, be deemed to be a parish separately maintaining its own highways.

Provision for outlying part of parishes.

Sect. 34. Where any highway which any body politic or corporate or person is liable to repair by reason of tenure of any land, or otherwise howsoever [shall be adjudged in the manner provided by the principal act to be out of repair (a)], the highway board of the district in which such highway is situate may, if they see fit, direct their surveyor to repair the same, and the expenses to be incurred in such repair shall be paid by the party liable to repair as aforesaid; and it shall be lawful for any justice, upon the application of any person authorised in this behalf by the highway board, to summon the party liable to pay such expenses to appear before 2 justices at a time and place to be named in such summons, and upon the appearance of the

Expenses of repair of highways may be recovered from party liable to repair ratione tenure.

(a) See 27 & 28 Vict. c. 101, s. 23, *post*, p. 1116.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.
Amendment of
s. 34 of Highway
Act, 1862.

25 & 26 Vict. c. 61.
Highways re-
pairable *ratione*
tenuræ may be
made repairable
by the parish.

parties, or in the absence of either of them, it shall be lawful for such justices to hear and determine the matter, and make such order, as well as to costs or otherwise, as to them may seem just.

27 & 28 Vict. c. 101, s. 23. Section thirty-four of the "Highway Act, 1862," shall be construed as if, instead of the words "shall be adjudged in the manner provided by the principal act to be out of repair," the words were substituted, "shall be adjudged in manner provided by the Highway Act, 1862, to be out of repair."

Sect. 35. Where any person or corporation is liable, by reason of tenure of lands or otherwise to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway; and in default of payment of such sum the board may proceed for the recovery thereof in the same manner as for the recovery of penalties or forfeitures recoverable under this act: Provided always, that when the sum so fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of such highway exceeds 50*l.*, the same, when received shall be invested in the name of the highway board of the district in some public government securities, and the interest and dividends arising therefrom shall be applied by such board towards the repair and maintenance of the highways within the parish in which such highway is situate; but when such sum does not exceed 50*l.* the same or any part thereof, at the discretion of such highway board, shall from time to time be applied by such board towards the repair and maintenance of the highways within such parish: Provided that any person aggrieved by any order of justices made in pursuance of this section may appeal to a court of general of quarter sessions holden within four months from the date of such order; but no such appeal shall be entertained unless the appellant has given to the other party to the case a notice in writing of such appeal, and of the matter thereof, with 14 days after such order, and 7 clear days at the least before such sessions, and has entered into a recognizance with two sufficient sureties before a justice of the peace, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as may be by the court awarded; and upon such notice being given, and such recognizance being entered into, the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court may seem meet:

From and after the making of such order by the justices, or by the court on appeal, as the case may require, such highway shall be repaired in like manner and at the like expense as highways which a parish is liable to repair.

27 & 28 Vict. c. 101.
Amendment of
s. 35 of Highway
Act of 1862.

27 & 28 Vict. c. 101, s. 24. The highway board may apply, under section 35 of the "Highway Act of 1862," for the purpose of making any highway to which that section refers a highway to be repaired and maintained by the parish in which the same is situate, and upon such application being made the same proceedings may be had as upon the application of the person or corporation liable to repair the same.

Appeal.

Sect. 36. Where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any driftway, or any private carriage or occupation road, within their parish, in return for the use thereof, the district surveyor may, at the request of the inhabitants of such parish assembled in a vestry duly convened for the purpose, and with the consent in writing of the owner and the occupier of every part thereof, apply to the justices in petty sessions to declare such driftway or road to be a public highway to be repaired at the expense of the parish; and upon such application being made it shall be lawful for the justices to declare the same to be a public carriage road to be repaired at the expense of the parish.

Sect. 37. No toll shall be demanded by virtue of any act of parliament on any turnpike road from the surveyor of a highway board when executing or proceeding to execute his duties as such surveyor, and all provisions applicable to the exemptions in the 3 Geo. 4, c. 26, shall apply to the case of the exemptions conferred by this enactment.

Sect. 38. No justice of the peace shall act as such in any matter in which he has already acted as a member of the highway board, and in which the decision of such board is appealed against.

Sect. 39. Any highway district formed under this act may from time to time be altered by the addition of any parishes in the same or in any adjoining county, or the subtraction therefrom of any parishes, and new highway districts may be formed by the union of any existing highway districts in the same or in any adjoining county, or any parishes forming part of any existing highway districts or any highway district may be dissolved; but any such alteration of existing districts, or formation of new districts, or dissolution of any district, shall be made by provisional and final orders of the justices; and all the provisions of this act with respect to the formation of highway districts and provisional and final orders of justices, and the notices to be given of and previously to the making of such orders, and all other proceedings relating to the formation of highway districts, shall, in so far as the same are applicable, extend to such alteration of existing or formation of new districts, or dissolution of districts, as is mentioned in this section; and in addition thereto provision shall be made, if necessary, in any orders of justices made under this section for the adjustment of any matters of account arising between parishes or parts of districts in consequence of the exercise of the powers given by this section. Where any parish is added to or any district united with any district in another county, the final order of the justices of the county in which such parish or district is situate shall not be confirmed by them until they shall have received the approval of their provisional order for such addition or union from the justices of the county in which the district is situate to or with which such addition or union is to be made. Where any highway district is dissolved, or where any parish is excluded from any highway district, the highways in such district or parish shall be maintained, and the provisions of the principal act in relation to the election of surveyors and to all other matters shall apply to the said highways, in the same manner as if such highways had never been included within the limits of a highway district.

Sect. 40. If any highway board make default in holding its first meeting in pursuance of this act, such board shall not thereupon become disqualified from acting, but the justices in general or quarter sessions shall, on the application of any persons liable to pay highway rates within the district, make such order as they think fit for the holding of such board at some other time, and any order so made shall be deemed to be an order capable of being removed into the court of Queen's Bench, in pursuance of the 12 & 13 Vict. c. 45, and may be enforced accordingly, and the costs of any application to the court of

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.
Provision as to roads laid out.

Surveyor of highway board exempted from turnpike tolls.

Limiting jurisdiction of justices.

Power to alter highway districts.

Provision in case of failure of board to hold first meeting.

30. *Highways into districts—Formation of.*

25 & 26 Vict. c. 61.
Reservation of right to adopt local government act.

27 & 28 Vict. c. 101.
As to service of notices issued by highway board.

Persons aggrieved by rates levied may appeal in manner provided by 6 & 7 Will. 4, c. 96.

Power to appeal to quarter sessions against items of expense and expenditure, &c.

quarter sessions in pursuance of this section shall be defrayed out of the district fund of the board.

Sect. 41. Any parish or part of a parish included in a highway district may adopt the Local Government Act in the same manner and under the same circumstances in and under which it might have adopted the same if it had not been included in such district; and upon such adoption being made such parish or part of a parish shall cease to form part of such district, subject nevertheless to the payment of any contribution that may at the time of such adoption be due from such parish or part of a parish to the highway board.

27 & 28 Vict. 101, s. 26. Any notice in respect of which no other mode of service is provided by the highway board in pursuance of powers in that behalf conferred on them, and any precept, summons, or order issued by the highway board, may be served,—

By delivery of the same personally on the party required to be served; or

By leaving the same at the usual or last known place of abode of such party as aforesaid; or

By forwarding the same by post as a prepaid letter addressed to the usual or last known place of abode of such party.

In proving service of a document by post it shall be sufficient to prove that the document was properly directed, and that it was put as a prepaid letter into the post office; and in serving notice on the overseers or the waywardens (if more than one) of any parish it shall be sufficient to serve the same on any one of such officers in a parish.

27 & 28 Vict. c. 101, s. 37. If any person feels aggrieved by any rate levied on him for the purpose of raising monies payable under a precept of a highway board on the ground of incorrectness in the valuation of any property included in such rate, or of any person being put on or left out of such rate, or of the inequality or unfairness of the sum charged on any person or persons therein, he may appeal to the justices in special sessions in manner provided by the 6 & 7 Will. 4, c. 96, ss. 6, 7, and all the provisions of the said sections shall be applicable to such appeal.

Sect. 38. Where any waywarden of a highway parish of a district, or any ratepayer of such parish, feels aggrieved in respect of the matters following:

- (1.) In respect of any order of the highway board for the repair of any highway in his parish on the ground that such highway is not legally repairable by the parish, or in respect of any other order of the board on the ground that the matter to which such order relates is one in regard to which the board have no jurisdiction to make an order;
- (2.) In respect of any item of expense charged to the separate account of his parish on the ground that such item of expense has not in fact been incurred or has been incurred in respect of a matter upon which the board have no authority by law to make any expenditure whatever;
- (3.) In respect of any item of expenditure charged to the district fund on the ground that such item of expense has not in fact been incurred, or has been incurred in respect of a matter upon which the board has no authority by law to make any expenditure whatever;
- (4.) In respect of the contribution required to be made by each parish to the district fund on the ground that such amount, when compared with the contribution of other parishes in the district, is not according to the proportion required by this act;

he may, upon complying with the conditions herein-after mentioned appeal to the court of general or quarter sessions having jurisdiction in the district; but no appeal shall be had in respect of any exercise

of the discretion of the board in matters within their discretion ; and no appeal shall be had except in respect of the matters and upon the grounds herein-before mentioned.

Sect. 39. No appeal shall be entertained by any court of general or quarter sessions in pursuance of this act unless the following conditions have been complied with :

- (1.) Notice of the intention of appeal must be served by the appellant on the clerk of the highway board in the case of an appeal against an order within 2 months after the order, and in the case of an appeal in respect of any item of expense or contribution within one month after the statement of the account of the board has been sent to each member of the board as herein-before mentioned :
- (2.) The notice must state the matter appealed against, and the ground of the appeal :

On the receipt of the notice the board may serve a counter-notice on the appellant, requiring him to appear in person or by his agent at the next meeting of the board and support his appeal. On hearing the appellant the board may rectify the matter complained of, and if they do so to a reasonable extent, and tender to the appellant a reasonable sum for the costs of his attendance, it shall not be lawful for the appellant to proceed with his appeal. In any other case the appellant may proceed with his appeal, and the reasonable costs of his attendance on the board shall be deemed part of the costs of the appeal.

Sect. 40. If at any time after notice of appeal has been given it appears to the court of general or quarter sessions, on the application of either party in the presence of or after notice has been given to the other party, that the matter in question in such appeal consists wholly or in part of matters of mere account which cannot be satisfactorily tried by the court, it shall be lawful for such court to order that such matters, either wholly or in part, be referred to the arbitration of one or more persons, to be appointed by the parties, or, in case of disagreement, by the court ; and the award made on such arbitration shall be enforceable by the same process as the order of the court of quarter sessions.

Sect. 41. The provisions of " The Common Law Procedure Act, 1854," relating to compulsory references, shall be deemed to extend to arbitrations directed by the court of quarter sessions ; and the word " court " in the said act shall be deemed to include the court of quarter sessions.

Sect. 42. If upon the hearing of the appeal it appears to the court that the question in dispute involves an inquiry as to whether a road is or is not a highway repairable by the public, or an inquiry as to any other important matter of fact, the court may either themselves decide such question, or may impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions, and submit to such jury such questions in relation to the matters of fact in dispute as the court think fit ; and the verdict of such jury, after hearing the evidence adduced, shall be conclusive as to the questions submitted to them.

The questions so submitted shall be in the form and shall be tried as nearly as may be in the manner in which feigned issues are ordinarily tried, and the court shall decide the parties to be plaintiffs and defendants in such trials.

Subject as aforesaid, the court may, upon the hearing of any appeal under this act, confirm, reverse, or modify any order of the highway board, or rectify any account appealed against.

Sect. 43. If the appellant is successful, the costs shall, unless the court otherwise orders, be paid by the board, and shall be charged to the parishes within the jurisdiction of the board other than the parish

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101. Conditions of appeal to general or quarter sessions.

Power to refer case to arbitration.

Provisions of 17 & 18 Vict. c. 125, incorporated.

Proceedings on appeal.

Costs of Appeal.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

Jurisdiction as to districts in different counties.

to which the appellant belongs in the same proportions in which such parishes contribute to the common fund of the board.

If the appellant is unsuccessful, the board, if the waywarden be the appellant, may charge the costs of the appeal to the parish to which the appellant belongs in the same manner as if they were expenses incurred in repairing the roads in such parish, and may levy the sum accordingly, and may carry the sum so levied to the account of the several parishes within the jurisdiction of the board, other than the parish to which the appellant waywarden belongs, in the same manner as if they were expenses contributed by such parishes to the common fund of the board; but if some ratepayer other than the waywarden is the appellant, the court may order the costs of the appeal to be paid by such appellant; and such costs shall be recoverable in the same manner as a penalty is recovered under "The Highway Act, 1862."

Sect. 44. Places situate in different counties, and places situate partly in one county, and partly in another county, when united in one highway district, shall, for all matters connected with the provisions of this act relating to appeals to quarter sessions against accounts, be deemed to be subject to the jurisdiction of the justices of the county in which the district is situate to which such places shall have been united by any provisional and final order or orders, or to which after the passing of this act any such district shall be declared to be subject by the orders constituting the same in the same manner as if all such places or parts of places were situate in such county.

APPLICATION OF PRINCIPAL ACT.

25 & 26 Vict. c. 61.

Construction of principal act and this act.

Sect. 42. The following regulations shall be observed with respect to the construction of the principal act and this act,

1. This act shall be construed as one with the principal act so far as is consistent with the provisions of this act:
2. Section 9 of the principal act, whereby it is enacted that a surveyor may be appointed by the inhabitants of a parish with a salary, shall not apply to any parish within any district formed under this act:
3. Section 10 of the principal act, whereby it is enacted that the surveyor or surveyors at the time of passing his or their accounts as therein mentioned shall deliver to the justices a statement in writing of the name and residence of the person or persons appointed to succeed him or them as a surveyor or surveyors, shall not apply to any parish within any district formed under this act:
4. Sections 13 to 17 of the principal act, providing for the formation of parishes into districts, and sects. 18 and 19 of the principal act, providing for the appointment of a board in large parishes, shall not apply to any parish within any district formed under this act:
5. The penalty imposed by sect. 20 of the principal act on the surveyor for neglect of duty shall not apply to a highway board constituted under this act:
6. Any summons or notice, or any writ or any proceeding, at law or in equity, requiring to be served upon the board, may be served by the same being left at or transmitted through the post in a pre-paid letter directed to the office of the board, or being given personally to the district surveyor or clerk of the board:
7. Section 35 of the principal act, whereby it is provided that the ratepayers of any parish may divide amongst themselves the carriage of materials in manner therein mentioned, shall not apply to any parish within any district formed under this act:

8. Sections 39, 40, 43, 44, and 45 of the principal act, relating to the accounts of surveyors, shall not apply to the highway board of any district formed under this act.

30. *Highways into districts—Formation of.*

Sect. 43. On the formation of a highway district the following regulations shall be enacted with respect to the surveyors and the highway board:

25 & 26 Vict. c. 61. Relative duties of outgoing surveyors and highway board.

1. No surveyor shall be appointed under the principal act for any parish within such district:
2. The outgoing surveyor of every parish within the district shall continue in office until 7 days after the appointment of the district surveyor by the highway board of the district of such outgoing surveyor, and no longer; and he may recover any highway rate made and then remaining unpaid, in the same manner as if this act had not been passed, and the money so recovered shall be applied, in the first place, in reimbursing any expenses incurred by him as such surveyor, and in discharging any debts legally owing by him on account of the highways within his jurisdiction, and the surplus (if any) shall be paid by him to the treasurer of the highway board; and he shall be entitled to receive from the highway board any sum (not exceeding 5*l.*), which on the allowance of his account shall be found to be due to him as such surveyor after the collection and expenditure of the whole of the highway rate made in such parish during the last year:
3. The highway board shall, for all the purposes of the principal act except that of levying highway rates, be deemed to be the successor in office of the surveyor of every parish within the district.

By 27 & 28 Vict. c. 101, s. 28, sect. 43 of the "Highway Act of 1862" shall be construed as if in the second article thereof the words "not exceeding 5*l.*" were omitted.

27 & 28 Vict. c. 101. Amendment of s. 43 of Highway Act, 1862.

Sect. 44. All the provisions of the principal act for widening, diverting, and stopping up highways shall be applicable to all highways which now are or may hereafter be paved, repaired, or cleansed under or by virtue of any local or personal act or acts of parliament, or which may be situate within the limits of any such act or acts, except highways which any railway company, or the owners, conservators, commissioners, trustees, or undertakers of any canal, river, or inland navigation, are liable by virtue of any act of parliament relating to such railway, canal, river, or inland navigation to make, maintain, repair, or cleanse.

25 & 26 Vict. c. 61. Provisions of principal act to be applicable to highways under local or personal acts.

Sect. 50. The clauses of "The Commissioners Clauses Act, 1847" (*a*), with respect to mortgages to be created by the commissioners, shall form part of and be incorporated with this act, and any mortgagee or assignee may enforce payment of his principal and interest by appointment of a receiver.

27 & 28 Vict. c. 101. Certain clauses of 10 & 11 Vict. c. 16, incorporated.

In the construction of the said clauses "the commissioners" shall mean "the highway board."

Mortgages and transfers of mortgages shall be valid if made in the forms prescribed by the last-mentioned act, or in the forms appearing in the second schedule annexed to this act, or as near thereto as circumstances admit.

Schedule 2.—Form of Mortgage.

The highway board of the district, in consideration of pounds paid to the treasurer of the said board by A. B. of , assigns unto the said A. B., his executors, administrators, and assigns, such proportion of the highway rates leviable in the highway parish or parishes of [*name the parishes*] as

Note.—See sect. 50 of act.

Note.—Highway rate includes poor rate, when the highways are

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101. maintained out of poor rate. See sect. 33 of act.
Note.—Highway parish means every parish that separately returns a waywarden or waywardens to the highway board. See sect. 8 of act.

the said sum of pounds bears to the whole sum borrowed on the credit of the said rates, to hold to the said A. B., his executors, administrators, and assigns, until the said sum of pounds, with interest at the rate of pounds per centum per annum, is paid.

The interest on this mortgage will be paid at on the day and days of in every year.

The principal will be paid at on the day of .

Given under our corporate seal this day of 18 .

Note.—*The mortgage must be under the corporate seal of the board, and duly stamped. See Commissioners Clauses Act, 10 Vict. c. 16, s. 75.*

Transfer of Mortgage by Indorsement.

The within-named A. B., in consideration of the sum of pounds paid to him by C. D. of , hereby transfers to the said C. D., his executors, administrators, and assigns, all his interest in the monies secured by the within-written mortgage and in the within-named rates.

In witness whereof the said A. B. has hereunto set his hand and seal this day of 18 .

Note.—*The transfer must be under seal and duly stamped. See section 77 of Commissioners Clauses Act, 10 Vict. c. 16.*

Power to contract for materials for repairing highways.

Sect. 52. The highway board may and is hereby authorised to contract for purchasing, getting, and carrying the materials required for the repair of the highways, and for maintaining and keeping in repair all or any part of the highways of any parish within their highway district, for any period not exceeding 3 years.

8 & 9 Vict. c. 18, and 23 & 24 Vict. c. 106, incorporated.

Sect. 53. A highway board for the purpose of improving the highways within their district may purchase such lands or easements relating to lands as they may require; and "The Lands Clauses Consolidation Act, 1845," and the act 23 & 24 Vict. c. 106, amending the same, shall be incorporated with this act, with the exception of the clauses relating to the purchase of land otherwise than by agreement.

In the construction of this act and the said incorporated acts this act shall be deemed to be the special act, and the board shall be deemed to be the promoters of the undertaking; and the word "land" or "lands" shall include any easement in or out of lands.

25 & 26 Vict. c. 61. Enabling councils of certain boroughs to adopt parish roads and highways, and to apply rates for their repair.

Sect. 45. Whereas there are in certain boroughs in England and Wales roads and highways that are now and have heretofore been repaired by the inhabitants of the several parishes or townships within which such roads and highways are situated, and who also contribute and pay to the general rates levied for the repair of the public streets, roads, and highways maintained and kept in repair by the council of such boroughs, by reason whereof a great burthen is imposed upon the ratepayers of the said parishes and townships; and it being doubtful whether the council of such boroughs have the power to adopt such parish roads and highways, or to apply the rates collected in such boroughs in repairing the same, be it enacted, that it shall and may be lawful for the council of every such borough in England and Wales, upon the petition of the majority of the rate-payers of such parishes or townships present at a public meeting duly convened, to adopt all or any of such parish roads and highways as the council shall in its discretion consider advisable, and to apply the rates levied and collected by the said council for the repair of the public streets, roads, and highways within such borough in repairing and maintaining such parish roads and highways: provided always, that it shall be competent for such council, previous to adopting such parish roads and highways, to require the provisions contained in any local act applying to the public streets, roads, and highways of such borough to be complied with.

27 & 28 Vict. c. 101. Jurisdiction of justices in petty sessions.

Sect. 46. The justices assembled in petty sessions at their usual

place of meeting may exercise any jurisdiction which they are authorised under the highway acts or any of them to exercise in special sessions; and no justice of the peace shall be disabled from acting as such at any petty or special or general quarter sessions in any matter merely on the ground that he is by virtue of his office a member of any highway board complaining, interested, or concerned in such matter, or has acted as such at any meeting of such board.

Sect. 46. No person through whose land a highway passes, which is to be repaired by the parish, shall become liable for the repair of such highway by erecting fences between such highway and the adjoining land, if such fences are erected with the consent in writing of the highway board of the district within which such highway is situate in the case of a place within the jurisdiction of a highway board, and in case of any other place with the consent of the surveyor or other authority having jurisdiction over the highway.

Sect. 47. All penalties under this act, and all monies recoverable as penalties, may be recovered summarily before any 2 or more justices in the manner directed by the 11 & 12 Vict. c. 43, and any act amending the same; but where any sum adjudged to be paid under this act in respect of such penalties or monies exceeds 5*l*. an appeal may be had by any person aggrieved to a court of general or quarter sessions in manner provided by the 24 & 25 Vict. c. 96, s. 101, intituled "An act to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences."

Sect. 27. The schedule annexed to the "Highway Act of 1862" shall be repealed so far as relates to the proceedings of highway boards; and the proceedings of highway boards shall, after the passing of this act, be subject to the regulations contained in the first schedule to this act annexed.

30. *Highways into districts—Formation of.*

27 & 28 Vict. c. 101.

25 & 26 Vict. c. 61. District highway boards may permit landowners to erect fences without incurring liability to repair highways.

Recovery of penalties.

Appeal.

27 & 28 Vict. c. 101. Schedule to Highway Act of 1862 repealed, and other regulations made.

(First Schedule).—PROCEEDINGS OF HIGHWAY BOARDS.

First Schedule of 27 & 28 Vict. c. 101.

- (1.) The board shall meet for the dispatch of business, and shall from time to time make such regulations with respect to the summoning, notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business, including the quorum at meetings of the board, as they think fit, subject to the following conditions:—
 - (a.) The first meeting after the formation of the district shall be held at the time and place fixed by the order of the justices in that behalf;
 - (b.) One ordinary meeting shall be held in each period of 4 months, and of such meetings one shall be held on some day between the 7th and 14th days of April;
 - (c.) An extraordinary meeting may be summoned at any time, on the requisition of 3 members of the board, addressed to the clerk of the board;
 - (d.) The quorum to be fixed by the board shall consist of not less than 3 members;
 - (e.) Every question shall be decided by a majority of votes of the members voting on that question;
 - (f.) The names of the members present at a meeting shall be recorded.
- (2.) The board shall at the first meeting, and afterwards from time to time at their first meeting after each annual appointment of members of the board as hereafter mentioned, appoint one of their members to be chairman and one other of their members to be a vice-chairman for the year following such choice.
- (3.) If any casual vacancy occur in the office of chairman or vice-

31. *Highways
in South Wales.*

27 & 28 Vict. c. 101.

- chairman, the board shall, as soon as they conveniently can after the occurrence of such vacancy, choose some member of their number to fill such vacancy; and every such chairman or vice-chairman so elected as last aforesaid shall continue in office so long only as the person in whose place he may be so elected would have been entitled to continue if such vacancy had not happened.
- (4.) If at any meeting the chairman is not present at the time appointed for holding the same, the vice-chairman shall be the chairman of the meeting; and if neither the chairman nor vice-chairman shall be present, then the members present shall choose some one of their number to be a chairman of such meeting.
 - (5.) In case of an equality of votes at any meeting the chairman for the time being of such meeting shall have a second or casting vote.
 - (6.) All orders of the board for payment of money, and all precepts issued by the board, shall be deemed to be duly executed if signed by 2 or more members of the board authorised to sign them by a resolution of the board, and countersigned by the clerk; but it shall not be necessary in any legal proceeding to prove that the members signing any such order or precept were authorised to sign them, and such authority shall be presumed until the contrary is proved.

XXXI. *Highways in South Wales.*

7 & 8 Vict. c. 91.

In 1844 an act (7 & 8 Vict. c. 91) was passed to amend the laws relative to turnpike trusts, in the six following counties of South Wales, viz., Glamorgan, Brecon, Radnor, Carmarthen, Pembroke, and Cardigan. It provided for the formation of county road boards in those counties, by enabling the justices at their quarter sessions to elect some of their number upon the board to which certain *ex officio* persons were added. These county boards were to have the entire control and management of all turnpike roads within their counties respectively. The provisions of the general turnpike acts (except so far as they were repealed or altered) were (s. 38) to apply to all roads which should be maintained by the board. The turnpike roads, and all other property vested in the trustees of the different roads, became the property of the county boards respectively (s. 44). Certain powers as to taking of toll, and the erection of gates, were conferred upon the boards by ss. 48—64. By ss. 65 and 66, the 3 & 4 Geo. 4, c. 126, ss. 78, 79, and 3 & 4 Will. 4, c. 80, ss. 1, 2, were repealed as to the above 6 counties. The proceedings of the boards, and the appointment of officers for the inspection and supervision of the roads, are regulated by ss. 67—93, and by ss. 96—102 power is given to those boards to improve rates for the proper repair and maintenance of the roads. By the 14 & 15 Vict. c. 16, the county road boards of the above 6 counties respectively are to divide each county into districts for the management of the highways situated therein respectively, and the roads in each of such districts are to be placed under the care of a highway board, subject to the authority of the county roads board, and powers are given to such highway boards to hold meetings to appoint certain officers (whose duties are defined), and to adopt new roads to be thereafter repaired as public highways. If any of such highways are out of repair at any time, powers are given to justices by s. 16 to direct them to be repaired at the cost of the party liable to do the same, this s. 16 differs from 4 & 5 Will. 4, c. 50, s. 94, in enabling justices to make an order for repair without any conviction for the non-repair. By s. 17, all the provisions of the 5 & 6 Will. 4, c. 50,

except as altered or amended, are to apply to all highways under this act. By the 17 Vict. c. 17, the time for putting the 14 & 15 Vict. c. 16, into execution, was limited to 25 March, 1855.

32. *Forms.*

XXXII. *Forms, List of.*

1. Notice to person of his having been elected surveyor, p. 1126.
2. Appointment of surveyor, with salary, p. 1126.
3. Appointment of surveyor by justices, p. 1126.
4. Notice of intention to make highway, p. 1127.
5. Certificate of justices of highway having been made in a substantial manner, &c., p. 1127.
6. Notice of holding a vestry for the appointment of a board for repair of highways, p. 1127.
7. Precept of justices for erecting guide posts, &c., p. 1127.
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9. Licence from justices, at special sessions for highways, for surveyor to dig, &c., materials upon enclosed lands for repairs, p. 1128.
10. Licence from justices, at special sessions for highways, to get materials for repairs in another parish besides that wherein such materials are to be employed, p. 1128.
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26. Notice of appeal against a certificate for stopping up or diverting a highway, p. 1136.
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32. Order for owner of land to prune hedges and cut down trees, pursuant to 5 & 6 Will. 4, c. 50, s. 65, p. 1138.
33. Information and conviction under 5 & 6 Will. 4, c. 50, s. 69, for encroaching on a carriageway, p. 1138.
34. Information and conviction under 5 & 6 Will. 4, c. 50, s. 78, for misconduct of driver, p. 1138.

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35. The like on s. 72, for laying timber, &c., on highway, p. 1139.
36. Warrant to distrain for a forfeiture, p. 1139.
37. Return of constable to be made upon the warrant of distress where no effects, p. 1139.
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39. Information against a parish for a highway being out of repair, p. 1140.
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41. Indictment for not repairing a highway against the parish, p. 1141.
42. Indictment for not repairing an ancient horse and footway, p. 1142.
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47. Plea that others, *ratione tenuræ*, are bound to repair, p. 1144.
48. Replication thereto, p. 1144.
49. Indictment for encroaching upon a highway by building thereupon, p. 1144.
50. Indictment for enclosing a highway, p. 1145.
51. Indictment for laying timber or other obstructions on a highway, p. 1145.
52. Indictment for obstructing a highway by erecting a gate, &c., across it, &c., p. 1145.
53. Indictment for a nuisance to a neighbourhood, and obstructing a highway, by exhibiting wild beasts, wax work, &c., p. 1146.
54. Indictment for stopping up a watercourse, whereby the highway is overflowed, p. 1148.
55. Indictment for obstructing the navigation of a public river, p. 1148.
56. Certificate of two justices that an indicted road is in good repair, p. 1149.

(1.) Notice to person of his having been elected surveyor (a).

A. B. Take notice, that you were, at a meeting held at [insert the name of the parish, &c.] on the day of elected and chosen surveyor [or, "one of the surveyors"] of the highways for the said ["parish, &c."] for the year ensuing.

Dated the day of .
To A. B. of .

C. D., Chairman.

(2.) Appointment of surveyor with salary (a).

At a meeting of the inhabitants of in vestry assembled, at on the day of A. B. was nominated, elected, and appointed a surveyor of such parish, for the purpose of carrying into execution the provisions of an act passed in the fifth and sixth years of the reign of King William the Fourth, intituled, An Act, &c. [here set out title of act], for the year ensuing: and the salary to be allowed to the said A. B. was fixed at the sum of payable on

Dated the day of .

C. D., Chairman.

(3.) Appointment of surveyor by justices (b).

At a special sessions for the highways, held at in the division, to wit, } &c. of , by justices of the peace for the said county, acting within the said division, &c., on the day of .

Whereas it hath appeared to us the said justices, on the oath of A. B., an inhabitant of the parish of , that the inhabitants of the said parish, in vestry assembled, have neglected [or "refused"] to nominate and elect a surveyor in manner and for the purposes mentioned in a certain act made and passed in the fifth and sixth year of the reign of King William the Fourth, intituled, An

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1010. A notice has also to be given to the outgoing surveyor.

(b) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1013.

Act, &c. [here set out title of act] [or "that the surveyor appointed by the inhabitants of the said parish is dead," or, "has ceased to possess the qualification required by the said act," or, "has become disqualified," or, "has neglected to act," or, "has refused to carry into operation the duties imposed upon him by the said act"], we do therefore hereby (a) appoint you C. D. of _____, surveyor for such parish for the year ensuing [or, "for the space of _____"], with the salary of _____ for your trouble; and you, the said C. D., are faithfully and truly to execute the office of surveyor according to the directions of the said statute.

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Given under our hands the day and year first above mentioned.

To C. D.

E. F.
G. H.

I do hereby give you notice, that after the expiration of three calendar months from the date hereof, I [or if given by the clerk, &c., of a body politic or corporate, describe them] do intend to make a certain highway in the parish of [describing its situation and extent], and to dedicate such highway to the use of the public. (4.) Notice of intention to make highway (b).

Dated this _____ day of _____.

To E. F., &c., surveyor of the parish }
of _____ }

A. B.

or

C. D. [Clerk, &c.]

We, two of the justices of the peace in and for the county of _____, having viewed a certain highway lately made by A. B. in the parish of _____ in the said county, situate &c. [describing its situation and extent], do hereby certify, that the same has been made in a substantial manner, and of the width required by a certain act made and passed in the fifth and sixth year of the reign of King William the Fourth, intituled An Act [here set out title of act]. (5.) Certificate of justices, of highway having been made in a substantial manner, &c. (b).

Dated this _____ day of _____.

C. D.
E. F.

Notice is hereby given that a vestry will be held at _____ in the parish of _____ in the county of _____, on the _____ day of _____ next, at the hour of _____ at _____ noon [or, "in the afternoon"], for the purpose of determining the expediency of forming a board for repair of the highways in the said parish; and if it shall be determined by a majority of two-thirds of the votes of the vestrymen present at such meeting to form such board, then for the further purpose of nominating and electing, not more than twenty, nor less than five householders, residing in and assessed to the relief of the poor, and liable to be rated to the repair of the highways of the said parish, to serve the office of surveyors of the highways of the said parish for the year ensuing, and for carrying into effect the powers, authorities, and directions contained in an act of Parliament made in the sixth year of the reign of King William the Fourth, for consolidating and amending the laws relating to highways in England. (6.) Notice of holding a vestry for the appointment of a board for repair of highways (c).

Dated this _____ day of _____.

(Signed)

Chairman.

["Inhabitants present."]

Middlesex.—At a special sessions for the highways held at _____, for the [hundred] of _____, in the said county, before A. B. & C. D. justices of the peace for the said county, acting within the said [hundred], on the _____ day of _____, (7.) Precept of justices for erecting guide posts, &c. (d).

To the surveyor of the [parish] of _____, in the said [hundred].

You are hereby required forthwith to erect, [or, "fix"] or cause to be erected [or "fixed"], in the most convenient place upon the highway, lying between _____ and _____, within your liberty, where two or more roads meet, a stone or post, with proper inscriptions pointed on both sides thereof, in large legible

(a) By sect. 11, justices have in certain cases power to dismiss a surveyor; if another surveyor be appointed in the room of one so dismissed this form might be used and altered accordingly.

(b) See ante, n. (b), p. 1126.

(c) See a form, *Shelf*. 160; see ante, p. 1002.

(d) See ante, p. 1004. The inhabitants in vestry may make the direction.

Highways in General.

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letters, not less than one inch in height and of proper and proportionate breadth, containing and denoting the towns of _____ and _____, [or other places, as the justices shall think most proper]. [Where graduated stones or posts are necessary to prevent accidents from floods, vary it as under.] "In the most convenient place upon the highway, at the approach or entrance on each side of the ford or water called _____ at _____, within your liberty, graduated stones or posts, denoting the depth of water in the deepest part thereof, through which such highway passes" [see further as to what he may be directed to do, ante, p. 1004]; and you are allowed to charge the reasonable expenses of providing and erecting the same in your accounts.

A. B.
C. D.

(8.) Notice to surveyor to remove snow, &c. (a).

I, A. B., justice of the peace in and for the county of _____, do hereby give you, the surveyor [or, "surveyors"] of the parish of _____, notice, that the highway leading from _____ to _____ [describing its situation], is obstructed or impeded from the accumulation of snow [or, "from the falling down of the banks on the side of the said highway, &c. as the case may be], and require you to cause the same to be removed.

Dated this _____ day of _____
To C. D. and E. F., &c.,
surveyors of the parish
of _____

A. B. of &c.

(9.) Licence from justices at special sessions for highways for surveyor to dig, &c., materials upon inclosed lands for repairs (b).

_____ } To the surveyor of the parish of _____ in the hundred of _____ in to wit. } the said county.

Whereas by an act passed in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c. [here set out title of act], the surveyor is authorised to dig, get, take, and carry away materials lying upon any lands or grounds within the parish for which he is appointed, for the use and benefit of the highways, but not without the consent of the occupier or owner of such lands or grounds, or his agent, or a licence from the justices at a special sessions for the highways: And whereas it appears to us _____ her Majesty's justices of the peace for the said county, and acting within the said [hundred, &c.], at a special sessions for the highways assembled, upon the oath of C. D. the said surveyor [or, "one of the surveyors"], that he hath applied to A. B. of _____, for his consent to dig, get, take, and carry away materials from the lands called or known by the names of _____ and _____, in his occupation [or, "of which he is the owner," or, "in the occupation of J. K." or, "of which J. K. is the owner, and the said A. B. his agent"], within the said [parish, &c.], for the purposes aforesaid, and that the said materials are necessary for the repairs of the highways, and that the said A. B. hath refused to permit the same to be dug, got, taken, and carried away; and the said A. B. having been duly summoned to appear before us, to show cause why such permission should not be granted, and having appeared before us accordingly, [or, "having sent his steward or agent," or, "C. D. on his behalf, to attend us on that occasion," or, "but not having appeared"], we have heard what has been alleged, and taken the said matter into consideration, and are of opinion that the said materials are necessary, and ought to be dug, got, taken, and carried away for the purposes aforesaid: therefore we do hereby give our licence to the said surveyor [or, "surveyors"] to dig, get, take, and carry away the same accordingly, the said surveyor making satisfaction for the same, and also for the damage done to such lands, in the manner directed by the said act.

Given under our hands the _____ day of _____, 18 _____.

J. P.
K. P.

(10.) Licence from justices at special sessions for highways to get mate-

_____ } At a special sessions for the highways held at _____, in the hundred, to wit. } &c. of _____ in the said county, by justices of the peace for the said county acting within the said hundred, on the _____ day of _____.

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1005.

(b) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1008.

It appearing to us, upon evidence this day received, that sufficient materials cannot conveniently be had within the waste land, common grounds, rivers, or brooks, nor in the inclosed lands or grounds, lying within the [parish, &c.] of in the said hundred, for the repairs of the highways within the said [parish], nor in the waste lands, common grounds, rivers, or brooks within the [parish] of adjoining to the said [parish] of , we do hereby give our licence to the surveyor [or, "surveyors"] of the said [parish] of , to search for, dig, get, and carry materials within the inclosed lands or grounds of C. D., within the said [parish] of , to be employed in the repairs of the highways within the said [parish] of , it appearing from evidence before us that there are proper materials within the said lands for the purposes aforesaid lying convenient to the said highways, and that after such materials shall be so taken, there will be sufficient left for the use of the highways within the said parish of upon the said surveyor [or, "surveyors"] making satisfaction for the same, and also for the damage done to such lands, in the manner directed by the act made and passed in the fifth and sixth years of the reign of King William the Fourth, intituled An Act, &c. [here set out title of act], subject to such restrictions as are therein contained.

Given under our hands the day and year above written.

J. P.
K. P.

County of } At a special sessions for the highways, holden, &c.

I. S., the surveyor [or, "one of the surveyors"] of the parish of A., came before the justices aforesaid, and informed them, that there is in the said county a certain common highway leading from M. to N., and that there is a certain part of the said highway, that is to say, so much thereof as lies between a certain place called C. and a certain other place called D., being in length [as the case may be], one side of which last-mentioned part of the said highway adjoining to the parish of A. lies within the said parish of A., and is to be and of right ought to be repaired by the said parish of A., [or, "by," &c., describing the body politic or corporate, or person liable to the repair], and that the other side of the same part of the said highway adjoining to the parish of B. lies within the parish of B., and is to be and of right ought to be repaired by the said parish of B. [or, "by," &c.], and stating that the repair of such part of the said highway is very inconvenient to the parishes aforesaid, and the want thereof detrimental to the public; and therefore praying, that such part of the said highway may be allotted and apportioned for the repair thereof by the justices aforesaid to the said several parishes of A. and B., [or, "to," &c.] in the manner directed by an act passed in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c. [set out title of act].

(Signed) I. S., one of the surveyors of parish of A.

The above application was made to us the day and year first above written.

J. P.
K. P.

County of } To the surveyor [or, "surveyors"] of the parish of B. in the said county, any or either of them.

Whereas a certain information has been given to us, her Majesty's justices of the peace for the said county, at a special sessions for the highways, by I. S., the surveyor [or, "one of the surveyors"] of the parish of A. in the said county, a true copy whereof is above written: These are, in her Majesty's name, to summon you, any or either of you, to appear before us, at in the said county, on the day of , to show cause (if any) why an allotment and apportionment of the highways therein mentioned should not be made according to the provisions of the act referred to in the said information. Hereof fail not.

Given under our hands this day of .

J. P.
K. P.

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rials for repairs in another parish besides that wherein such materials are to be employed (a).

(11.) Information to enable justices to fix boundaries of highway lying in two parishes (b).

(12.) Summons to be subjoined to a copy of above information (b).

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1008.

(b) This form is given by the act 5 & 6 Will. 4, c. 50; see ante, p. 993.

32. *Forms.*

(13.) Final order and adjudication to be filed with clerk of peace (a).

Whereas, &c.—[State—1. The original application.—2. The summons.—3. The appearance, and that the parties were heard, or their non-appearance.]
Now we, the justices aforesaid, having fully heard and understood the premises, do declare, adjudge, and order, that the said highway shall be divided in the following manner; (that is to say), that at the distance of measuring from the place called C., there shall be erected certain posts or stones, E. and F., on each side of the said highway, and the whole of the said highway from the place called C., to such posts or stones, shall be from time to time, and at all times hereafter, repaired by the parish of A. [or, “by,” &c.], and the whole of the said highway, from such posts or stones to the place called D., shall from time to time, and at all times hereafter, be repaired by the parish of B. [or “by,” &c.]

In witness whereof we have hereunto set our hands this

day of .
J. P. (L. s.)
K. P. (L. s.)

(14.) Notice of holding a vestry for forming a district (b).

Notice is hereby given, that a vestry will be held at , in the parish of , in the county of , on the day of next, at the hour of in the forenoon [or, “afternoon”] in order to consult about the expediency of directing one of the churchwardens of the said parish, or the chairman of the said vestry, to make application to the justices to be assembled at the next special sessions to be held at [the division where the parish is situate], for the purpose of uniting the said parish of with the several parishes of A., B., C., and D., in the said county, into a district, for the purpose of having one sufficient person to be the surveyor of such district: and for nominating a fit and proper person to be returned to the said justices, to be appointed surveyor of such district, with the amount of the yearly salary which the inhabitants of the said parish of shall agree to pay to him, pursuant to the powers for that purpose contained in an act made in the fifth and sixth year of the reign of King William the Fourth, for consolidating and amending the laws relating to highways in England.

Dated the day of .

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 993.

(b) See the form, *Shelford on Highways*, 159; and see *ante*, p. 1015.

Highways in General.

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32 Form.

Weekly account of money expended on the highways of the parish of _____ from _____
the _____ to the _____ day of _____, one thousand eight hundred and _____.
(15.) Weekly account(a).

Day labour, and when performed.	Labourers' names.	No. of days.	Rate per day.	—	Team work, and where done.	Rate.	—	Total weekly expenditure.	
				£ s. d.				£ s. d.	
									Day labour
									Contract work }
									Materials .
									Team work
Works executed by contract.	Persons' names.	No. of days.	Rate per day.	—	Tradesmen's bills.	No.	—	Tradesmen's bills }	
				£ s. d.					
					Rent of pits and quarries.	Name.	—	Rent of pits and quarries }	
Materials got and prepared, and from whence.	Parties' names.	Quantity.	Rate per	—					
				£ s. d.					
					Incidental expenses.	—		Incidental expenses }	

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50, ante, p. 1016.

32. *Forms.*

(16.) Schedule to be filled up by surveyors of highways of all parishes, and presented by them, with their accounts, to the magistrates, at end of every year (a).

State of the roads and highways . . .	{	_____
— bridges	{	_____
— causeways	{	_____
— hedges and ditches . . .	{	_____
— watercourses	{	_____
State all nuisances	{	_____
— all encroachments	{	_____
— the extent of roads and highways the parish is liable to repair .	{	_____
— what portion thereof has been repaired, and where . . .	{	_____
— what materials were used for such repairs	{	_____
— the expense of such repairs .	{	_____
— the amount levied during the year	{	_____

(17.) Form of highway rate (b).

Names of occupiers or persons rated.	Description of the premises and property rated.	Annual Value.	Sums assessed at 10d. in the pound.
A. B. . . .	House and garden .	£ s. d. 5 0 0	£ s. d. 0 4 2
C. D. . . .	A farmhouse, lands, and buildings .	100 0 0	4 3 4
E. F. . . .	A warehouse . . .	20 0 0	0 16 8
and so forth.			

A. B. } Surveyor [or, "surveyors"] of the
C. D. } parish of .

(18.) Justices' notice to surveyor to show cause why a poor labourer should not be excused from highway rates (c).
 — } To Mr. A. B., surveyor of the highways within the [parish] of
 to wit. } in the said county.
 Whereas E. F., of , in your [parish], labourer, hath this day made complaint on oath to us, two of her Majesty's justices of the peace in and for the said county, at a special sessions for the highways assembled, that he wholly gains his livelihood by daily labour, and that, by reason of his numerous family, he is in very poor and indigent circumstances, and utterly unable to pay or contribute towards any rates or assessments for or in respect of any highways within the said parish, and hath prayed of us, the said justices, that he may be

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1019.

(b) This form is prescribed by the

5 & 6 Will. 4, c. 50; see *ante*, p. 1024.

(c) See a similar form in *Shelford on Highways*, 155; see *ante*, p. 1025.

excused from paying the same: We, the said justices, do therefore hereby give you notice to appear before us, at _____ in the said county, on Thursday, the _____ day of _____, at our special sessions for the highways, to be then and there held, to show cause why the said E. F. should not by us be adjudged to be excused from the payment of such rates or assessments accordingly.
Given under our hands and seals this _____ day of _____, A.D.

32. Forms.

To Mr. C. D., of the _____ of _____, in the county of _____.
County } Whereas complaint and information have been made upon oath be-
of — } fore us, two of her Majesty's justices of the peace for the said county,
one whereof is of the quorum, by the surveyor of the highways for the said _____, that, by a rate or assessment duly made, allowed, and published, according to the statute in that case made and provided, the sum of _____ was duly rated and assessed upon you, for and towards the amending, repairing, and supporting the highways within the said _____, and that you, the said C. D. have refused and neglected to pay the same within ten days after demand thereof made, and have not yet paid the same: These are therefore to require you personally to appear before us (or such other of her Majesty's justices of the peace as shall be present), at _____ in the said county, on _____ the _____ day of _____ at the hour of _____ in the _____ noon, there to answer to the said complaint and information, and to show cause why the said sum should not be levied on your goods and chattels pursuant to the said statute. Herein fail not. Given under our hands and seals this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

(19.) Summons for nonpayment of assessment (a).

— } To the surveyor of the highways for the [parish] of _____, in the
Stafford. } said county.

(20.) Warrant of distress for non-payment of (b).

Whereas in and by a rate and assessment made, assessed, allowed, and published, according to the directions of the act passed in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c [here set out title of act] A. B., an inhabitant and occupier of a house in the said parish, was charged the sum of _____, as his share and proportion of the said assessment, in respect of the lands, tenements, woods, tithes, and hereditaments, which he occupied within the said [parish, &c.]: And whereas it appears to us, two of her Majesty's justices for the said county, one whereof is of the quorum, as well upon the oath of _____, surveyor of the highways of the said parish, as otherwise, that the said sum of _____ hath been duly demanded from the said A. B., and that he hath refused to pay the same for the space of ten days after such demand made: and whereas the said A. B. having appeared before us, in pursuance of our summons for that purpose, hath not shown to us any sufficient cause why the same should not be paid: [or, "and whereas it hath been duly proved to us, upon oath, that the said A. B. hath been duly summoned to appear before us the said justices, to show cause why the same should not be paid; but he the said A. B. hath neglected to appear according to such summons, and hath not shown to us any sufficient cause why the same should not be paid:"] These are therefore, in her Majesty's name, to command you to levy the said sum of _____, by distress of the goods and chattels of the said A. B.; and if the same shall not be paid within the space of four days next after such distress by you taken, together with the reasonable charges of taking and keeping the same, that you do then sell the said goods and chattels so by you distrained; and out of the money arising by such sale that you do pay unto C. D., the surveyor of the highways for the said [parish, &c.] of _____, the said sum of _____, to be employed for the purposes aforesaid; and that you do return the surplus thereof to the said A. B., the reasonable charges of taking, keeping, and selling the said distress, being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B., whereon to levy the said sum of _____, that then you certify the same to us, together with this warrant (c). Given under our hands and seals the _____ day of _____.

(a) See a form, *Shelf*. 156; see *ante*, p. 1025.

(b) See *ante*, p. 1025. See a form given by the 13 Geo. 3, c. 78; and see a form in *Morrell v. Martin*, 4

Scott, N. R. 301.

(c) The surveyor's return to this warrant, where there are no effects, will be similar to the form 39, p. 1140.

32. Forms.

(21.) Bond from collector of highway rates (a).

Know all men by these presents, that we [collector] of &c., and [surety] of &c., are held and firmly bound to [surveyor of highways], of &c., in the penal sum of _____, [double the full amount of the sum likely to be in the hands of the collector at any one time], of good and lawful money of Great Britain, to be paid to the said [surveyor], or his certain attorney, executors, administrators or assigns, for which payment to be well and truly made, we jointly bind ourselves, our heirs, executors, administrators, and each of us severally, separately and apart from the other of us, bindeth himself, his heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this _____ day of _____, in the year _____

Whereas at a meeting of the inhabitants of _____, in the county of _____, in vestry assembled, on the _____ day of _____, the said [surveyor] was elected and chosen surveyor of the highways of the said parish of _____, for the year then next ensuing.

And whereas at another meeting of the inhabitants of the said parish of _____, in vestry assembled, on the _____ day of _____, the majority of the inhabitants then and there present did consent to the appointment of the said [collector], as collector of the highway rates of the said parish of _____; and at the same meeting it was agreed that the sum of _____, payable on the _____ day of _____, out of the monies to be received by the said [collector] in respect of the highway rates of the said parish of _____, should be allowed to the said [collector].

And whereas the said [surveyor] hath duly appointed the said [collector] to be collector of the highway rates of the said parish for the year ensuing, with such allowance as aforesaid.

Now, therefore, the condition of the above-written bond or obligation is such, that if the said [collector] shall from time to time, and at all times hereafter during his continuance in the said office or employment of collector, not only during the current year, but also during every and all future years, well, truly, and duly execute and perform the duty of collecting the highway rates of the said parish of _____, and faithfully demand and collect all and every the sum and sums of money in the assessments to the highway rates of the said parish of _____ charged and specified, of the respective persons from whom the same shall or may become payable, and shall and do, in case of non-payment thereof, duly enforce the powers of the statute in that case made and provided, against such persons as shall make default therein. And if the said [collector], his executors or administrators, shall duly and faithfully account for and pay all and every the sum and sums of money which shall come into his hands, as collector of the said highway rates, at the end of every _____ days from the time of receiving the same, unto the said [surveyor] or as he shall direct; and if the said [collector] shall, under his hand, and at such time and in such manner as the said [surveyor] shall direct, deliver to the said [surveyor] true and perfect accounts of all monies which shall have been received by the said [collector], by virtue of his appointment as aforesaid, and also a list of the names of all such persons as shall have neglected or refused to pay their respective highway rates, and of the monies due from them respectively; and if the said [collector] shall pay all such monies as shall remain due from him to the said [surveyor] or other person lawfully entitled to receive the same; and if the said [collector] shall deliver to the said [surveyor] or to such person as he shall appoint to receive the same, within three days after being thereunto required by the said [surveyor], by notice in writing under his hand, given or left at the usual place of abode of the said [collector], all books, papers, and writings in his custody or power, relating to the execution of his office as collector as aforesaid, or give satisfaction to the said [surveyor] respecting the same, then the above-written bond or obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

[Signature and seal of collector.]

[Signature and seal of surety.]

Sealed and delivered by the above bound [collector] }
and [surety], in the presence of _____ }

(22.) Order of two justices for widening a highway (b). — We, two of her Majesty's justices of the peace for the said county, acting within the [hundred, &c.] of _____, within the said county,

(a) See form, *Shel.* 158; see *ante*, p. 1027. This bond does not require a stamp.

(b) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1030.

having, upon view, (see ante, p. 1030, n. b.) found that a certain part of the highway between and , in the [parish, &c.] of , in the said [hundred], for the length of yards or thereabouts, and particularly described in the plan hereunto annexed, is for the greatest part thereof narrow, but may be conveniently enlarged and widened by adding thereto from the lands and grounds of and , of the length of yards or thereabouts, and of the breadth of feet or thereabouts, particularly described in the plan hereunto annexed, which we think will widen and enlarge the same, and be much more commodious to the public, do hereby order, that the said highway be widened and enlarged accordingly, and that the surveyor [or, "surveyors"] of the [parish, &c.] of , where the said old highway lies, do forthwith proceed to treat and make agreement with the said and for the recompense to be made for the said ground, and for the making such ditches and fences as shall be necessary, in such manner, with such approbation, and by pursuing such measures and directions in all respects as are warranted and prescribed by the statute made in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c. ; and in case such agreement shall be made as aforesaid, we do order an equal assessment, not exceeding the rate of in the pound, to be made, levied, and collected upon all and every the parties liable to the payment of the highway rate in the said [parish, &c.] of , and that the money arising thereupon be paid and applied in making such recompense and satisfaction as aforesaid, pursuant to the directions of the said act.

A. B.
C. D.

32. Forms.

To the justices of the peace at their general quarter sessions to be held at in the said county, the day of , one thousand eight hundred and .
We, the within-named A. B. and C. D., do hereby certify to the said court of quarter sessions, that we made and signed the within order, and that with our approbation and by our direction the said surveyor [or, "surveyors"] has [or, "have"] treated with the said and for the said lands required for the purposes aforesaid, but was not able to make any agreement for that purpose with them or either of them, and that he tendered to the said the sum of , and to the said the sum of , as a recompense for the said ground, and for the making the said ditches and fences, which he [or, "they and each of them"] refused to receive.

A. B.
C. D.

(23.) Certificate from said justice to quarter sessions (a).

I, A. B., of , in the county of , being the owner of the lands described in the plan hereunto annexed, through which part of a certain highway lying between and is intended to be diverted and turned, in consideration of the sum of , to be paid to me for the said land and soil thereof, do hereby consent to the making and continuing such new highway through my said lands.

Given under my hand this day of , one thousand eight hundred and .

(24.) Consent from owner of land through which a new highway is proposed to be made (b).

Notice is hereby given, that on the day of next, application will be made to her Majesty's justices of the peace assembled at quarter sessions in and for the county of at for an order for [if the order be for turning, diverting, and stopping up, &c., here to state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road, here to state it, and describe the road ordered to be stopped up]; and that the certificate of two justices having viewed the same, &c., with the plan of the old and proposed new highway, will be lodged with the clerk of the peace for the said county on the day of next.

A. B. } surveyor [or, "surveyors"] of the parish
C. D. &c. } of .

(25.) Notice of diverting, &c., highway (b).

(a) This is to be written upon the above order when no agreement can be made. The act so directs it. This form is prescribed by the 5 & 6

Will. 4, c. 50; see ante, p. 1031.

(b) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1031.

32. Forms.

(26.) Notice of appeal against a certificate for stopping up or diverting a highway (a).

To the surveyor of the highways of the parish of _____, in the county of _____.
Take notice, that I intend to appeal to the next general quarter sessions of the peace, to be holden in and for the county of _____, against an order or certificate bearing date the _____ day of _____, under the hands of _____ and _____, two of her Majesty's justices of the peace of and for the said county, by which said certificates the said [justices] have certified that, &c. [here state so much of the certificate as will show the road to which it applies, and the object of the proposed order]. And take notice, that I think that I shall be injured or aggrieved (see ante, p. 1090) if the said highway so proposed to be diverted and turned [or, "stopped up"] should be ordered to be diverted and turned, and such new highway set out and appropriated in lieu thereof as aforesaid, [or, "stopped up"] : and further take notice that the grounds of such appeal are, first, that the said proposed new highway is not nearer or (ante, p. 1090) more commodious to the public ; second, that the said proposed new highway will pass so near to the dwelling-house now in my occupation, situate in the said parish of _____, as to be a serious nuisance and annoyance to me and all other persons living in the said house, on account of the great number of waggons, carts, and other carriages which are continually passing and repassing to and from the towns and places, to and from which the said proposed new highway will lead ; third, that the said proposed new highway will come within _____ yards of my said dwelling-house ; fourth, that great expense must necessarily be incurred in purchasing the ground or soil required for the said proposed new highway, and in making, forming, and completing the same for public use, and that I, as the occupier of a messuage and divers lands and other hereditaments, am liable to be assessed in a considerable sum in the rate to be levied and raised in respect of the highways in the said parish of _____, and that a large proportion of the expense to be incurred as aforesaid must be borne and paid by me as such occupier as aforesaid : [or, "first, that the public highway so proposed to be stopped up is not unnecessary or useless to the public ; second, that if an order should be made, and the said highway should be stopped up, I who have heretofore used, and have a right to use the same, shall be compelled to go a much greater distance to the next market town from my residence than I should if the said highway so proposed to be stopped up were kept open ; third, that if an order should be made, and the said highway should be stopped up, I and my tenants, occupiers of a certain farm, lands, and houses nearly adjoining to the said highway, and who have heretofore used, and have a right to use the same, and also other persons and the public would be put to, and sustain great inconvenience and delay ; fourth, that I and my tenants aforesaid would be compelled to travel to the places to which I and they have heretofore had occasion to travel and resort by the said highway so proposed to be stopped up, by another circuitous road, and at a greater distance than I and they would have had to travel if the said highway so proposed to be stopped up had continued open"] : and take notice, that at the trial of such appeal I mean to avail myself of all or some one or more of the said grounds, in support of the said appeal.
Witness my hand, this _____ day of _____, 18 _____.

(27.) Notice from surveyor to remove nuisances (b).

To C. D. of _____.
In pursuance of the directions given by an act passed in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c. I, A. B., &c., the surveyor [or, "one of the surveyors"] of the parish of _____, do hereby give you notice forthwith to remove the [filth, dung, ashes, rubbish, &c.], placed by you on a certain part of the king's highway, lying between _____ and _____, in the [parish] of _____, to the obstruction and annoyance of the said highway.
Dated this _____ day of _____. A. B., &c.

(28.) Summons for any person to attend a justice or justices (b).

— } *Whereas complaint and information hath been made upon oath before to wit. { me, C. D., one of her Majesty's justices of the peace for the said [county, &c.] by E. F. of _____, that, &c. [here state the nature and circumstances of the case, as far as it shall be necessary to show the offence and to*

(a) This form is taken from *Shelf. 5 & 6 Will. 4, c. 50 ; see ante, p. 1062.*
 on *Highways*, 161 ; see *ante*, p. 1078.
 (b) This form is prescribed by the

bring it within the authority of the justice; and, in doing that, follow the words of the act as near as may be]: *These are, therefore, to require you personally to appear before me* [or, "*the justices to be assembled at their petty sessions (or special sessions for the highways) to be holden at* , *in the said county, &c.*"], *on the* day of next, *at the hour of* in the noon, *to answer to the said complaint and information made by the said E. F., who is likewise directed to be then and there present to make good the same. Herein fail not.*

Given under my hand this day of .

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— } *Be it remembered, that on the* day of , A. B. of , (29). Information (a).
to wit. } *in the said county, informeth and maketh oath before me* , one of
her Majesty's justices of the peace for the said county, *that* of , in
the said county, *[here describe the offence, with the time and place, and follow the words of the act as near as may be], contrary to the statute in the fifth and sixth year of the reign of his Majesty King William the Fourth, intituled An Act, &c. [here set out title of act], which hath imposed a forfeiture for the said offence.*

Taken and sworn the day of before me, A. B.

— } *Be it remembered, that on the* day of , in the year of our (30). Form of conviction (b).
to wit. } Lord , at , in the county aforesaid, A. B. came before us
of her Majesty's justices of the peace for the said county, and informed us, that E. F. of , on the day of now last past, at , in the said county, *did [set forth the manner described by the act], whereupon the said E. F., after being duly summoned to answer the said charge, appeared before us on the* day of , in the said county, and having heard the charge alleged against him, declared that he was not guilty of the said offence; but the same being fully proved upon the oath of G. H., a credible witness, it manifestly appears to us the said justices that he the said E. F. is guilty of the offence charged upon him in the said information: It is therefore considered and adjudged by us the said justices, that the said E. F. be convicted, and we do hereby convict him of the offence aforesaid; and we do hereby declare and adjudge that the said E. F. hath forfeited the sum of of lawful money of Great Britain, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided.

Given, &c.

[This is to be inserted when the party refuses to appear upon the summons.—After the words, "*being duly summoned to answer the said charge,*" insert "*did not appear before us pursuant to the said summons,*" or "*did neglect and refuse to make any defence against the said charge;*" but the same being fully proved, &c., as before.]

[This is to be inserted when he confesses the charge.—After the words "*charge alleged against him,*" insert "*acknowledged and voluntarily confessed the same to be true;*" and it manifestly appears to us the said justices, &c., as above.]

[The 5 & 6 Will. 4, c. 50, gives a general form of information and conviction which will here apply, and will be found (*ante*, Nos. 29 and 30). This offence may be stated thus:—

That after the 20th day of March, A.D. 1836, to wit, on the day of , A.D. 18 , *in the parish aforesaid, in the county aforesaid, a certain tree was planted, called a* , *within the distance of fifteen feet from the centre of a certain carriageway [or, "cartway,"] to wit, at the distance of [10] feet from*

(31). Information or conviction on 5 & 6 Will. 4, c. 50, s. 64, for not cutting down, &c., a tree planted within 15 feet of the centre of a carriage-way.

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1089.

(b) This form is prescribed by the 5 & 6 Will. 4, c. 50; see *ante*, p. 1089. As to the form and requisites

of convictions in general, see "*Conviction.*" By sect. 97 of the above act, the justices are empowered to award costs. See as to the form of an order for the payment of costs, *ante*, tit. "*Conviction.*"

32. Forms.

the centre of the said way, the said way being then and there and at the severa times hereinafter mentioned a highway called , and then leading from (see post, p. 1141) the town of , in the county of , towards and unto the town of , in the county of , and that the said C. D., being then and there and at the times hereafter mentioned, the owner [or, "occupier"] of the said land and soil, whereon the said tree was so planted as aforesaid, did not cut down, grub up, and carry away the said tree, within twenty-one days after notice given on the day of , A.D. 18 , to the said C. D. by A. B., then the surveyor of the said highway, so to do, but then and there wholly neglected so to do, contrary to the form of the statute, &c. [Conclude as in the forms given by the act.]

(32). Order for owner of land to prune hedges, and cut down trees, on 5 & 6 Will. 4, c. 50, s. 65 (a).

At a special sessions for the highways held at , in the [hundred] of , in the county of , on , the day of , in the year of our Lord , by justices of the peace for the said county, acting within the said [hundred].

Whereas complaint hath been made unto us by A. B., surveyor of the to wit. } highways of the [parish] of , that a certain carriageway [or, "cartway"] leading from to , is prejudiced by the shade of certain hedges of A. O., of , and extending from to , and by divers trees of the said A. O., adjoining the said highway, (not being trees planted for ornament or for shelter to any hop-ground, house, building, or court-yard of the said A. O.), growing in and near such hedges and other fences of the said A. O., and that the sun and wind are excluded from such highway to the damage thereof.

And whereas the said A. O., having been duly summoned to answer the said complaint, hath made default in his appearance [let this agree with the fact]. Now we, upon duly considering the circumstances of the case, do order, that such hedges be cut, plashed, and pruned so as not to exceed the height of from the surface of the field, and that all such trees as grow in and near such hedges, in the grounds occupied by the said A. O., near the said highway, (not being trees planted for ornament or for shelter to any hop-ground, house, building, or court-yard of the said A. O.), be cut down, or be pruned and lopped, so that the sun and wind may not be excluded from such highway to the damage thereof; and we do further order, that in case the said A. O. shall not obey this order within ten days after a copy of this order shall have been left at the usual place of abode of the said A. O., or of his steward or agent, that then A. B., the said surveyor, do cut, prune, and plash such hedges, and cut down or prune and lop such trees, in manner directed by this order, to the best of his skill and judgment, and according to the true intent and meaning of the statute in such case made and provided, and proceed against the said A. O. immediately afterwards for recovery of the penalties and charges he will thereby incur.

Given under our hands and seals, the day and year first above written.

33). Information and conviction on 5 & 6 Will. 4, c. 50, s. 69, for encroaching on a carriageway (b).

[The 5 & 6 Will. 4, c. 50, gives a general form of information and conviction which will here apply and be found, ante (No. 29, 30). This offence may be stated thus:]—That C. D., of the [parish] of , in the said county [farmer], on the day of , in the year aforesaid, at the [parish] aforesaid, in the county aforesaid, did encroach on a certain carriageway [or, "cartway"] there situate, and being then and there a highway then leading from the town of , in the county of , towards and unto the town of , in the county aforesaid, by then and there making [or, "causing to be made"] a building [or, "hedge," "ditch," or, "fence,"] on the said carriageway [or, "cartway"] and highway, within the distance of fifteen feet from the centre of the said carriageway [or, "cartway"] and highway [stating this according to the nature of the encroachment]; contrary to the statute, &c. [Conclude this as in the form given by the act.]

4). Information and conviction on 5 & 6 Will. 4, c. 50,

[The 5 & 6 Will. 4, c. 50, gives a general form of information and conviction, which will here apply and be found ante, (No. 29, 30). State the

(a) See ante, p. 1045.

(b) See ante, p. 1048.

offence thus :]—That C. D., of _____, in the said county [labourer], on the day of _____, in the year aforesaid, at the [parish] of _____ in the county aforesaid, did ride upon a certain waggon ["cart," or "carriage"], drawn by, to wit, [two] horses, on a certain common Queen's highway, then leading from (post, p. 1141) the town of _____, in the county of _____, towards and unto the town of _____, in the county of _____, being then and there and at the time he so rode upon the said waggon ["cart," or "carriage"] the driver of the same, and there not being then and there and at the time he so rode upon the same any other person on foot or on horseback to guide the same, and the said waggon ["cart," or "carriage"] not being then and there and at the time the said C. D. was riding upon the said waggon ["cart," or "carriage"] driven with reins, nor then and there at the time he was so riding as aforesaid conducted by any person holding the reins of all the horses, then and there and at the time he was so riding as aforesaid drawing the same; and the said C. D., not being then and there and at the time he so rode upon the said waggon ["cart," or "carriage"] the owner of the same; [or, describing some other of the offences within stat. 5 & 6 Will. 4, c. 50, s. 78, ante, p. 1052]; contrary to the statute, &c. [Conclude as in the form given by the act.]

32. Forms.

s. 78, for misconduct of drivers (ante, p. 1054).

[The 5 & 6 Will. 4, c. 50, gives a general form of information and conviction, which will here apply and be found, ante, (No. 29, 30). State the offence thus :]—That C. D., of _____, in the said county [labourer], on the day of _____, in the year aforesaid, at the [parish] of _____, in the county aforesaid, did lay a large quantity, to wit, one cart load of dung, ["timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter," as the case is], on a certain highway there situate and then leading from the town of _____, in the county of _____, towards and unto the town of _____, in the county aforesaid, to the injury of the said highway [or, "to the injury," "interruption," or "personal danger" of persons travelling on the said highway," according to the fact]; contrary to the statute, &c. [Conclude as in the form given by the act.]

(35). The like on s. 72, for laying timber, &c., on highway (ante, p. 1056).

To the constable [headborough or tithing-man] of _____ }
Whereas A. B., of _____, in the said county [yeoman, &c.], is this day convicted before us, two of her Majesty's justices of the peace in and for the said county, upon the oath of G. H., a credible witness, for that the said A. B. hath, [here set forth the offence, describing it particularly in the words of the act, as near as may be], contrary to the statute in that case made and provided; by reason whereof the said A. B. hath forfeited the sum of _____, to be distributed as herein is mentioned, which he hath refused to pay: These are therefore in her Majesty's name to command you to levy the said sum of _____, by distress of the goods and chattels of him the said A. B.; and if within the space of four days next after such distress by you taken, the said sum of _____, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale that you do pay one-half of the said sum of _____, to E. F. of _____, who informed me of the offence, and the other half of the said sum of _____ to I. K., the surveyor of the parish ["township," or, "place"] where the said offence ["neglect" or, "default"] happened, to be employed towards the repair of the said highways, returning the overplus, upon demand, to him the said A. B., the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of _____, that then you certify the same to us, together with this warrant.

(36). Warrant to distrain for a forfeiture (a).

Given under our hands the _____ day of _____ C. D.
E. F.

I, A. B., constable of the [parish, &c.] of _____, in the county of _____, do hereby certify and make oath, that by virtue of this warrant I have made dili-

(37). Return of constable to be made upon war-

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1056.

32. Forms. *gent search for the goods of the within-named , and that I can find no sufficient goods whereon to levy the within sum of . As witness my hand the day of .*

rant of distress where no effects (a).

Sworn before me, the day and year, &c.

A. B.
C. D.

(39). Commitment for want of distress (b).

To the [constable] of , in the said county, and to the keeper of the common gaol [or, "house of correction"] at , in the said county.

— } *Whereas A. B. of , in the said county, yeoman, was, on the day of , convicted before us, two of her Majesty's justices of the peace in and for the said county, upon the oath of E. F., a credible witness, for that he the said A. B. [here set forth the offence], contrary to the statute made in the fifth and sixth year of the reign of King William the Fourth, intituled An Act, &c. [here set out title of act], by reason whereof the said A. B. hath forfeited the sum of . And whereas, on the day of , in the year aforesaid, we did issue our warrant to the [constable] of , to levy the said sum of by distress and sale of the goods and chattels of him the said A. B., and to distribute the same according to the directions of the same statute: And whereas it duly appears to us upon the oath of the said [constable], that the said [constable] hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same: These are therefore to command you the said [constable] of aforesaid, to apprehend the said A. B., and him safely convey to the common gaol [or "house of correction"] at in the said county, and there deliver him to the keeper thereof, together with this precept. And we do hereby also command you the said keeper to receive and keep in your custody, and to keep to hard labour the said A. B. for the space of , unless the said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing this shall be your sufficient warrant.*

Given under our hands the day of , in the year of our Lord .

C. D.
E. F.

(39). Information against a parish for a highway being out of repair (see ante, p. 1085).

— } *Be it remembered that on the day of , A.D. 18 , J. B., to wit. } of , in the eastern division of the county of Essex, builder, informeth and maketh oath before me , esquire, one of her Majesty's justices of the peace for the said county of Essex, on the day of , in the year of our Lord 18 , that there was and still is a certain common and public highway, situate, lying, and being in the parish of aforesaid, in the county aforesaid, and within the eastern division of that county, used for all the liege subjects of our lady the Queen and her predecessors, with their horses, coaches, carts and carriages, to go, return, pass, repass, ride and labour at all times of the year, at their free will and pleasure; and that a certain part of the said highway, situate, lying and being wholly and entirely in the said parish of , being of the length, that is to say, of feet, and being of the breadth, that is to say, of feet, on the day of , in the year of our Lord 18 , and from thence continually until the exhibiting and making of this information, was and yet is out of repair and in great decay for want of due reparation and amendment of the same, so that the subjects of our said lady the Queen going, returning, passing and repassing, riding and labouring in and along the same, with their horses, coaches, carts and carriages, could not, during the time aforesaid, nor can they go, return, pass, repass, ride and labour, without great danger, to the common nuisance of all the liege subjects of our said lady the Queen in and along the said way, going, returning, passing, repassing, riding and labouring, and against the peace of our said lady the Queen, her crown, and dignity; and that the inhabitants of the said parish of , the said part of the said highway being so out of repair and in decay as aforesaid during all the time aforesaid, of right ought to have repaired and amended, and still of right ought to repair and amend, when and as often as it should or shall or may be necessary as aforesaid, which said premises are contrary to the statute made in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to consolidate and amend the Laws relating to Highways*

(a) This form is prescribed by the 5 & 6 Will. 4, c. 50; see ante, p. 1088.

(b) *Id.* As to the forms of commitments in general, see ante, "Commitment in Execution."

in that part of Great Britain called England," which hath imposed on the surveyors of the highways of the said parish of _____ a forfeiture of a penalty not exceeding the sum of 5*l*. for the said offence. 32. *Forms.*

Taken and sworn this _____ day of _____, A.D. 18 _____, before me, A. B.

At a special sessions for the highways in and for the eastern division of the county of Essex, held at the Maid's Head Inn, in the _____ of Thorpe, within the said division, before _____, one of her Majesty's justices of the peace for the eastern division of the county of Essex, acting in and for the said division, on Monday, the _____ day of _____, in the year of our Lord 18 _____.

Whereas information in writing, on the oath of J. B., of the parish of _____ to wit, _____, of _____, in the aforesaid division of the said county of Essex, builder, a credible witness, was, on the _____ day of _____, A.D. 18 _____, exhibited and made unto _____, esquire, one of her Majesty's justices of the peace for the county of Essex, acting in and for the eastern division of the said county, that there was a certain common and public highway, situate, lying and being in the parish of _____ aforesaid, in the county aforesaid, and in the eastern division of that county, used for all the liege subjects of our said lady the Queen and her predecessors, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at all times of the year, at their free will and pleasure, and that a certain part of the said highway, situate, lying, and being wholly and entirely in the said parish of _____, being of the length, to wit, _____ feet, and of the breadth, to wit, _____ feet, on the _____ day of _____, in the year of our Lord 18 _____, and from thence continually until the said exhibiting and making of the said information was out of repair and in great decay for want of due reparation and amendment of the same, so that the subjects of our said lady the Queen going, returning, passing and repassing, riding and labouring in and along the same, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor could they then, go, return, pass or repass, ride and labour, without great danger, to the common nuisance of all the liege subjects of our said lady the Queen in and along the said highway, going, returning, passing, repassing, riding, and labouring, and against the peace of our said lady the Queen, her crown and dignity; and that the inhabitants of the said parish of _____, the said part of the highway being so out of repair and in decay as aforesaid during all the time aforesaid, of right ought to have repaired and amended, and then still of right ought to have repaired and amended, when and as often as it should or might be necessary, which said premises were contrary to the statute made in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England."

And whereas the said _____ did, in pursuance of such information, and of the before-mentioned statute, duly issue his summons, requiring _____ and _____, the surveyors of the highways of the said parish of _____ to appear before the said justices to be assembled at their special sessions for the highways at the time and place above-mentioned.

And whereas the said _____ and _____, having been duly served with such summons, did appear in pursuance thereof before the said justices at the said special sessions for the highways above-mentioned, and on the hearing of the said summons at the said special sessions, denied, on the behalf of the inhabitants of the said parish of _____, the duty and obligation of the said inhabitants to repair such part of the said highway as in the said information is described as being out of repair.

We, the undersigned justices, present at the said special sessions, do therefore order and direct that the said _____ do prefer a bill of indictment, and subpoena the necessary witnesses in support thereof at the next _____, against the inhabitants of the said parish, for suffering and permitting the said highway to be out of repair as aforesaid.

Given under our hands and seals the _____ day of _____, and _____ year first above written.

The jurors for our lady the Queen, upon their oath present, that from the time whereof the memory of man runneth not to the contrary, there was and yet is a common and ancient Queen's highway leading from [the town _____] (41). Indictment for not repairing a highway, against the parish (h).

32. Forms.

of , in the county of , towards and unto [the market town of , in the county of], used for all the liege subjects of our said lady the Queen, and of her predecessors, with their horses, coaches, carts, and carriages, to go, return, pass, ride, and labour at all times of the year at their will and pleasure, and that a certain part of the same Queen's common highway, situate, lying, and being in the [parish] of , in the county of aforesaid, beginning at the place called , and so continued towards [the market town of] aforesaid, for the length of feet, and being of the breadth of feet, on the day of , in the year of the reign of our said lady the Queen, and continually afterwards until the day of the taking of this inquisition, was and yet is in great decay, for the want of due reparation and amendment of the same: so that the subjects of our said lady the Queen passing and travelling through the same with their horses, coaches, carts, and carriages, could not during the time aforesaid, nor yet can go, return, pass, ride, and labour without great danger; to the great damage and common nuisance of all the liege subjects of our said lady the Queen passing through that way, and against the peace of our said lady the Queen, her crown and dignity; and that the inhabitants of the said parish of , in the said county of , the common highway aforesaid (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary.

Against individuals.

[Or, "that A. O., of aforesaid, gentleman, ought, by reason of the tenure of his lands and tenements, called , situate, lying, and being at aforesaid, in the county aforesaid, to repair and amend the said highway, when and so often as it shall be necessary," see ante, p. 1070].

(42). Indictment for not repairing an ancient horse and footway (a).

— } The jurors for our lady the Queen upon their oath present, that to wit. } from the time whereof the memory of man runneth not to the contrary, there was and yet is a certain common and ancient highway, leading from , in the county of , towards and unto , in the county of , for all the liege subjects of our said lady the Queen, and her predecessors, on horseback and on foot, to go, return, pass, ride, labour, and drive their cattle at all times of the year at their will and pleasure, and that a certain part of the same common highway, situate, lying, and being within the [parish] of , in the county of aforesaid, beginning at a place called , and so continued towards the said of , in the county of , aforesaid, of the length of feet, and the breadth of feet, on the day of , in the year of the reign of , and continually afterwards until the day of taking this inquisition, at the [parish] of , aforesaid, in the county aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment of the same, that the liege subjects of our said lady the Queen by and through the same way with their horses and cattle could not, during the time aforesaid, nor yet can go, return, pass, ride, and labour as they ought and were wont to do, without great danger of themselves and of their goods, to the great damage and common nuisance of all the liege subjects of our said lady the Queen, through the same highway going, returning, passing, riding and labouring, and against the peace of our said lady the Queen, her crown and dignity; and that the inhabitants of the same [parish] of , in the county aforesaid, the same common highway (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary.

43). Order for particulars of ways out of repair (b).

The king on the prosecution of against .
Upon hearing Mr. , of counsel for the prosecutor, and Mr. , of counsel for the defendant, I do order that, upon production of an affidavit by Mr. , (the defendant's attorney), that on reading the indictment, he is unable to understand all the precise tracks indicted, the attorney or agent for the prosecutor shall, at the costs of the prosecutor, within one week after the delivery of a copy of Mr. 's affidavit to Mr. (the attorney for the prosecution) deliver to the defendant's attorney a particular, in writing, of the several highways, pack, and primeways, and footways, for the obstruction of which the bill of indictment has been preferred and found; and that the prosecutor shall be precluded,

(a) See a great variety of forms in 3 Chit. C. L.

(b) See *R. v. Marquis of Downshire*, 4 Ad. & E. 698, ante, p. 1075.

at the trial of the indictment, from giving evidence respecting any other highways, pack, and primeways, and footways, than those named in the particular. The prosecutor, with his attorney and one surveyor, to be at liberty to go on the premises on some one day, having given the defendant or his attorney two days' previous notice of the time at which they will attend, and doing no unnecessary damage to the premises.

Dated this day of

J. Parkc.

And A. B. and C. D., two of the inhabitants of the said parish of B. by E. F., their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say, that they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, &c.

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And J. S. and J. N., two of the inhabitants of a certain district or township called , in the said parish of , by Y. Z., their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid; because they say that the said parish of is, and, from time whereof the memory of man is not to the contrary, hitherto has been divided into three districts or townships called A., B., and C.; and that the inhabitants respectively of the several districts or townships of A. and C. have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships, independently of each other; and that so much of the said highway in the said indictment mentioned as leads from to , lies within the said district or township of A., and so much of the said highway as leads from to , lies within the said district or township of B., and so much of the said highway as leads from to , lies within the said district or township of C.; and that the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, lies in that part of the said parish of , called the district or township of C.; and by reason of the premises aforesaid, the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A., in the said parish; and this they the said J. S. and J. N. are ready to verify; wherefore, for themselves and the rest of the inhabitants of the said district or township of A., they pray judgment, and that they and the rest of the said inhabitants of the said district or township by the court here may be dismissed and discharged from the said premises in the said indictment above specified.

(44.) Plea of general issue by parish (a).

(45.) Plea, that a particular division of the parish is bound to repair (b).

(a) See forms, 4 *Chit. C. L.* and *Arch. C. L.*, &c. See the observations, *ante*, p. 1075. In making up the record, if the plea be pleaded to an indictment at the assizes or sessions, the similiter is added thus:—"And G. H., who prosecutes for our said lady the Queen in this behalf, doth the like;" but if the plea be pleaded to an indictment in the Queen's Bench, the similiter is added thus:—"And G. H., Esq., coroner and attorney of our said lady the Queen, in the court of our said lady the Queen, before the Queen herself, who prosecutes for our said lady the

Queen in this behalf doth the like." If the plea be pleaded to an information, then the similiter is added thus:—"And the said attorney-general (or coroner and attorney) of our said lady the Queen, who prosecutes as aforesaid for our said lady the Queen, doth the like."

(b) See *ante*, p. 1076. The inhabitants of B. should, it seems, in this case plead a similar plea; and the inhabitants of C. should plead the general issue. See the precedents, *C. C. C.* 392; 6 *Went.* 394, 410, 411.

32. *Forms.*

(40). Replication thereto.

[Commencement as *infra*, No. 48, to the asterisk,* and then thus :—*that the inhabitants respectively of the several districts or townships of A. and C. have not, from time whereof the memory of man is not to the contrary, hitherto been used or accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships independently of each other : and this he the said G. H. prays may be inquired of by the country, &c.* [Or the prosecutor may traverse the fact of the part of the road out of repair being within the district of C.]

(17). Plea, that others, *ratione tenuræ*, are bound to repair (a).

And A. B. and C. D., two of the inhabitants of the said parish of B., by E. F. their attorney, for themselves and the rest of the inhabitants of the said parish (excepting one A. C.), come into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment against the inhabitants of the parish last aforesaid (excepting the said A. C. as aforesaid) ; because they say, that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, the said A. C., by reason of his tenure of certain lands and tenements called _____, lying and being in the said parish, ought to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, when and so often as there should be occasion, [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do]. And thus they the said A. B. and C. D. are ready to verify ; wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of B., (excepting the said A. C. as aforesaid), by the court here may be dismissed and discharged from the said premises in the said indictment above specified.

(18). Replication thereto.

And hereupon G. H., [the clerk of the peace, or clerk of the arraigns], who prosecutes for our said lady the Queen in this behalf, says, that, by reason of any thing in the said plea above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of B. ; because he says,* that the said A. C. ought not to repair or amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, by reason of his said tenure, in manner and form, as in and by the said plea is above supposed and alleged : and this he the said G. H. prays may be inquired of by the country. And the said A. B. and C. D., for themselves and the rest of the inhabitants of the parish of B. aforesaid, do the like. Therefore let a jury, &c., &c.

(40). Indictment for encroaching upon a highway by building thereupon (b).

— } The jurors for our lady the Queen upon their oath present, that
to wit. } A. O., on the _____ day of _____, in the _____ year of our Lord, at _____, in and upon a certain common highway, in a certain place, commonly called _____, there, leading from _____ towards and unto _____, by a certain building there, containing in length _____ feet, and in breadth _____ feet, by the said A. O. erected and built, hath unlawfully and unjustly encroached, and doth yet encroach, and the building aforesaid, so as is aforesaid erected and built by him the said A. O., from (ante, p. 1142) the aforesaid _____ day of _____ in the year aforesaid, unto the day of exhibiting this information at _____, aforesaid, in the county aforesaid, with force and arms unlawfully and unjustly

(a) See *ante*, p. 1077. See a plea by the inhabitants of a parish that a private individual is liable to repair *ratione clausuræ*. (*R. v. Mawgan*, (3 N. & P. 502), and see the precedents [in *C. C. C.* 322, 391; 4 *Went.* 162, 171, 176, 184 ; 6 *Went.* 411.]

(b) See *ante*, p. 1065. See a form of an indictment for obstructing a

highway by building or continuing a building upon it. (4 *Went.* 181, 191 ; 1 *Ad. & E.* 822.) And, 'as to the form of an indictment for not repairing a house standing on the highway, ruinous and likely to fall down, see *Lord Raym. Entries*, 25 ; *Reg. v. Watts*, 2 *Lord Raym.* 856 ; 1 *Salk.* 357, *S. C.* ; and see a variety of precedents, 3 *Chit. C. L.*

hath continued, and doth continue, by reason whereof the common highway aforesaid hath become and is greatly straitened, so that the liege subjects of the said lady the Queen upon and through the same common highway aforesaid, with their horses, carts, and carriages, cannot go, pass, ride, and labour as they ought and were wont to do, to the great and common nuisance of all the liege subjects of the said lady the Queen, in and through the said common highway going, passing, riding, and labouring, and against the peace of the said lady the Queen, her crown and dignity.

32. *Forms.*

— } *The jurors for our said lady the Queen upon their oath present, that to wit. } whereas from the time whereof the memory of man runneth not to the contrary, the liege subjects of our said lady the Queen had and lawfully used a certain common highway at , in the said county, in a certain place there, called , leading from (ante, p. 1141) [the town of], towards and unto [the town of], for themselves and their goods, without any stoppage or hindrance by any ditches, hedges, or other obstacles whatsoever; nevertheless, one A. O., on the day of , in the year of the reign of , with force and arms, at aforesaid, in the county of aforesaid, in the place aforesaid, called , upon the common highway aforesaid, a certain ditch and quickset hedge did make, and the said ditch and quickset hedge so as aforesaid made, doth yet continue and keep; to the great stoppage and hindrance of the liege subjects of our said lady the Queen passing in and through the said common highway, and against the peace of our said lady the Queen, her crown and dignity.*

(50). Indictment for inclosing the highway.

— } *The jurors for our lady the Queen upon their oath present, that A. O., to wit. } on the day of , in the year of the reign of our lady the now Queen Victoria, and on divers other days and times, as well before as afterwards, with force and arms, at , in the said county, in and upon a certain Queen's common highway there, leading from (ante, p. 1141) towards and unto [the town of], divers great pieces of timber put and placed, and caused to be put and placed, and the same great pieces of timber so as aforesaid put and placed from the aforesaid day of , in the year aforesaid, until the day of exhibiting this information, in and upon the Queen's common highway aforesaid, to be, lie, and remain, hath permitted, and doth still permit, to the grievous and common nuisance of all the liege subjects of the said lady the Queen, upon and through the Queen's common highway aforesaid, going, passing, riding, and travelling, and against the peace of our said lady the Queen, her crown and dignity. [Or, , a great quantity of dung and other filth, by reason whereof divers hurtful, noxious, and unwholesome smells from the said dung and other filth did then and there arise, and thereby the air there became, was, and is corrupted and infected . Or, cart-loads of rubbish , by reason whereof the said highway for the whole time aforesaid was straitened and obstructed, so that the liege subjects of our said lady the Queen could not so freely pass and repass about their lawful business, through the said common highway there, as they ought and have been accustomed .]*

(51). Indictment for laying timber or other obstructions on a highway (a).

— } *The jurors for our lady the Queen upon their oath present, that W. J. to wit. } and J. P., on the day of , in the year of our Lord, at the parish of aforesaid, in the county aforesaid, in, upon, and across a certain common highway there, called , and leading from (ante, p. 1142) a certain place called , towards and unto a certain other place called , in the county aforesaid, unlawfully and injuriously did put, place, and erect a certain gate, and divers posts, rails, and fences, and did then and there lock and fasten up the said gate, and from thence continually afterwards,*

(52). Indictment for obstructing a highway by erecting a gate, &c., across it (b).

(a) See *ante*, p. 1056. See forms of indictments for obstructing a highway by laying soil (*C. C. C.* 303) and rubbish upon it. (*C. C. C.* 315.)

(b) See *ante*, p. 1051. See precedents, of indictments for obstructing a highway by continuing a hedge across it, (*C. C. C.* 307); by erect-

ing a gate across it (6 *Went.* 401—405; *R. v. Botfield*, 1 *C. & Mar.* 151); by placing carts upon it for the sale of vegetables, (*C. C. C.* 305); by digging holes in it, (*C. C. C.* 303, 314); by digging a horsepond and erecting a cistern in it, (*C. C. C.* 304).

32. *Forms.*

Second count.

Third count.

until the day of taking this inquisition, have unlawfully and injuriously upheld, maintained, and continued the said gate, posts, rails, and fences, so put, placed, and erected as aforesaid, and so locked and fastened as aforesaid, in, upon, and across the said highway,* whereby the said highway hath for and during all the time aforesaid been greatly obstructed and stopped up, so that the liege subjects of our said lady the Queen could not, during the time aforesaid, go, return, pass and repass, ride, and labour, with their horses, coaches, carts, and other carriages, in, through, and along the said highway, as they ought to have done, and were wont and accustomed to do, to the great damage and common nuisance of all the liege subjects of our lady the now Queen, going, returning, passing, repassing, riding and labouring through and along the said highway, to the evil example of all others, and against the peace of our said lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, further present, that the said W. J. and J. P., well knowing the premises, on the day of , in the year of the reign aforesaid, and from thence continually afterwards until the day of taking this inquisition, at the parish aforesaid, in the county aforesaid, in, upon, and across a certain other common highway there, called , in the parish aforesaid, in the county aforesaid, unlawfully and injuriously did uphold, maintain and continue a certain gate, and divers posts, rails, and fences, before then wrongfully and injuriously put, placed and erected as aforesaid, in, upon, and across the said highway, the said gate being locked and fastened. [Conclude as in first count from the *.] And the jurors aforesaid, upon their oath aforesaid, further present, that the said W. J. and J. P., on the day of , in the year of the reign aforesaid, and from thence continually afterwards until the day of taking this inquisition, at the parish aforesaid, in the county aforesaid, in, upon, and across a certain other common highway there, called , in the parish aforesaid, in the county aforesaid, unlawfully and injuriously did uphold, maintain, and continue a certain gate, locked and fastened, in, upon, and across the said highway. [Conclude as in first count from the *.]

(53). Indictment for a nuisance to a neighbourhood, and obstructing a highway, by exhibiting wild beasts, wax-work, &c., playing music, and attracting numbers of persons together (a).

— } The jurors for our lady the Queen upon their oath present, that A. C., to wit, { J. D., and T. A., on the day of , in the year of our Lord, and on other days and times between that day and the day of taking this inquisition, at the parish of , in the county aforesaid, near unto divers public streets, being the Queen's common highways, and also near unto the dwelling-houses, shops, residences, and premises of divers liege subjects of our said lady the Queen there situate, and being unlawfully and injuriously in a certain messuage and premises there, did keep and maintain, and cause, and procure, and suffer, and permit to be kept and maintained, divers beasts, quadrupeds, birds, and animals, and also divers figures and pieces of wax-work, and other goods, and chattels, for the purpose, amongst other things, of exhibiting the same for profit and reward, and did then and there unlawfully and injuriously induce, persuade, solicit, and attract, and cause, and procure, and suffer, and permit to be induced, persuaded, solicited, and attracted, divers idle and disorderly and other persons to walk into and about the said messuage and premises to view and see the said quadrupeds, birds, and animals, figures, and pieces of wax-work, and other articles, things, goods, and chattels; and did also then and there unlawfully and injuriously blow, sound, strike, and play on, and cause, and procure, and suffer, and permit to be blown, sounded, struck, and played on, divers horns, trumpets, clarionets, hautboys, panspipes, fifes, and other musical instruments, in, upon, and about the said messuage and premises, so as thereby and therewith to make divers loud, noisy, harsh, discordant, and unpleasant sounds and noises, and unlawfully and injuriously did then and there by means of the premises, cause, and procure, and suffer, and permit divers idle and disorderly and other persons to collect, meet, congregate, and assemble together in one of the said public streets and highways called street, opposite and near to and about the said messuage and pre-

(a) See *ante*, p. 1056; and see other forms of indictments for nuisances, *post*, "Nuisance." And see form of an indictment for obstructing

a highway by exhibiting effigies at a window, and thereby attracting a crowd. (*R. v. Carlisle*, 6 C. & P. 637.)

mises, and there to remain and continue together in crowds and assemblages, so that by reason of the said several premises, not only the said street and highway called *street*, and other the streets and highways there, then, and on the said several other days and times, for and during all the time aforesaid, on each of the said days and times were greatly obstructed, so that the liege subjects of our said lady the Queen could not then and on the said other days and times go, return, pass, re-pass, ride, and labour, on foot, and with their horses, coaches, carts, and other carriages, in, through, and along the said last-mentioned street and highway as they ought and were wont and accustomed to do, but also the said subjects of our lady the Queen dwelling, occupying, using, residing, and living in their said dwelling-houses, shops, residences, and premises, near to and about the said messuage and premises, wherein the said beasts, quadrupeds, birds, animals, figures, and pieces of reawork, and the said other articles, things, goods, and chattels were so kept and maintained as aforesaid, and in, upon, and about which, the said horns, trumpets, clarionets, hautboys, panspipes, fifes, drums, and other musical instruments were so blown, sounded, struck, and played on as aforesaid, then, and on the said several other days and times, for and during all the time aforesaid, on each of the said days and times, were greatly annoyed, disturbed, and incommoded in the use, occupation, and enjoyment of their said dwelling-houses, shops, residences, and premises, and greatly obstructed, interrupted, and injured in the exercise of their respective lawful professions, trades, businesses, and transactions therein, and thereby also the liege subjects of our said lady the Queen in, through, upon, and along the said streets and highways there, and upon the said other days and times, going, returning, passing, re-passing, riding and labouring, were greatly annoyed, endangered, and incommoded, to the great damage and common nuisance of all the liege subjects of our said lady the Queen, going, returning, passing, re-passing, riding and labouring in, through, and along the said several streets and highways, and of the said liege subjects of our said lady the Queen occupying, using, residing, and living in their said dwelling-houses, shops, residences, and premises; to the evil example of all others, and against the peace of our said lady the Queen, her crown and dignity. And the jurors aforesaid, on their oath aforesaid, do further present, that the said A. C., J. D., and T. A., on the *day of* in the *year of our Lord*, and on other days and times between that day and the day of taking this inquisition, at the parish aforesaid, in the county aforesaid, near unto divers public streets being the Queen's common highways, and also near unto the dwelling-houses, shops, residences, and premises of divers liege subjects of our said lady the Queen there situate and being, unlawfully and injuriously did cause, and procure, and suffer, and permit, divers idle and disorderly and other persons to collect, meet, congregate, and assemble together in one of the said public streets and highways, called *street*, and there to remain together in crowds and assemblages, so that by reason of the said several premises not only the said street and highway called *street*, and other the streets and highways there, then and on the said several other days and times, for and during all the time aforesaid, on each of the said days and times, were greatly obstructed, so that the liege subjects of our said lady the Queen could not then, and on the said other days and times, go, return, pass, re-pass, ride, and labour in, through, and along the said last-mentioned street and highways, as they ought, and were wont and accustomed to do, but also the said subjects of our said lady the Queen dwelling, occupying, using, residing, and living in their said dwelling-houses, shops, residences, and premises, then and on the said several other days and times, for and during all the time aforesaid, on each of the said days and times, were greatly annoyed, disturbed, and incommoded in the use, occupation, and enjoyment of their said dwelling-houses, shops, residences, and premises, and greatly obstructed, interrupted, and injured in the exercise of their respective lawful professions, trades, businesses, and transactions therein, to the great damage and common nuisance of all the liege subjects of our said lady the Queen going, returning, passing, re-passing, riding and labouring in, through, and along the said several streets and highways, and of the liege subjects of our said lady the Queen, occupying, using, residing, and living in their said dwelling-houses, shops, residences, and premises; to the evil example of all others, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, further present, that the said A. C., J. D., and T. A., on the *day of* in the *year aforesaid*, and on divers other days and times afterwards and before the day of the taking of

Second count.

Third count.

32. *Forms.*

this inquisition, at the parish aforesaid, in the county aforesaid, near unto divers public streets and highways there, and also near to the dwellings, shops, residences, and premises of divers subjects of our said lady the Queen there situate, unlawfully and injuriously did, in a certain messuage and premises there, keep and maintain, and cause, and procure, and suffer, and permit to be kept and maintained, divers tame and wild beasts and quadrupeds, birds and animals; and thereby divers noisome, offensive, and unwholesome smells, and stenches during the time aforesaid, on the said several days and times aforesaid, were emitted and issued from and out of the said messuage and premises, and from the excrement, dung, and filth made and created by and from the said beasts, quadrupeds, birds, and animals, so that the air then and there was and is greatly corrupted, offensive, uncomfortable, and unwholesome, to the great damage and common nuisance of the subjects of our said lady the Queen there inhabiting, being, and residing, and going, returning, and passing in, along, and through the said streets and highways; to the evil example of all others, and against the peace of our said lady the Queen, her crown and dignity.

(54). Indictment for stopping up a watercourse, whereby the highway is overflowed (a).

— } The jurors for our lady the Queen upon their oath present, that A. O.,
to wit. } the day of . . . , in the year of our Lord, at the parish
of . . . , in the county aforesaid, a certain ancient watercourse, adjoining to
the Queen's common highway, within the said parish, leading from [the town
of . . . , in the county aforesaid], towards and unto . . . , with gravel and
other materials, unlawfully and injuriously did obstruct and stop up, and the
said watercourse so as aforesaid obstructed and stopped up from the said
day of . . . , in the year aforesaid, until the day of the taking of this inquisition
at the parish aforesaid, in the county aforesaid, unlawfully and injuriously
hath continued and still doth continue, by reason whereof the rain and waters
that were wont and ought to flow and pass through the said watercourse on the
same day and year, and divers other days and times afterwards, between that
day and the day of the taking of this inquisition, did overflow and remain in
the Queen's common highway aforesaid, and thereby the same was and yet is
greatly hurt and spoiled; so that the liege subjects of our said lady the Queen
through the same way with their horses, coaches, carts, and carriages, then and
on the said other days and times, could not nor yet can go, return, pass, ride,
and labour, as they ought and were wont to do, to the great damage and common
nuisance of all the liege subjects of our said lady the Queen through the same
highway going, returning, passing, riding, and labouring, and against the peace
of our said lady the Queen, her crown and dignity.

(55). Indictment for obstructing the navigation of a public river (b).

Gloucestershire, } The jurors for our lady the Queen upon their oath present,
to wit. } that the river Severn, that is to say, a certain part of the said
river lying and being in the county of Gloucester, is, and from the time whereof
the memory of man is not to the contrary, hath been an ancient river, and the
Queen's ancient and common highway, for all the liege subjects of our lady the
Queen and her predecessors, with their ships, barges, lighters, boats, wherries,
and other vessels, to navigate, sail, row, pass, re-pass, and labour, at their will
and pleasure, without any impediment or obstruction whatsoever. And the
jurors aforesaid, upon their oath aforesaid, do further present, that J. S., on
the third day of August, in the year of our Lord, at the parish aforesaid, in
the county aforesaid, unlawfully, wilfully, and injuriously did [erect, fix, put,
place, and set in the said river, and Queen's ancient and common highway there,
near a certain place called Guy's Shard, a certain snare, trap, machine, and
engine, commonly called Putts, for the taking and catching of fish, and com-
posed of wood, wooden stakes, and twigs; and that he the said J. S., on the
said third day of August, in the year last aforesaid, and on divers other days
and times between that day and the day of the taking this inquisition, with force
and arms, at the parish aforesaid, in the county aforesaid, in the said river and
Queen's ancient and common highway there, the said snare, trap, machine, and

(a) See a similar form of indictment, C. C. C. 306.

(b) See ante, p. 975. This form

is taken from Arch. Crim. Pleadings and Evid., 15th ed. 777.

engine, called *Putts*, unlawfully, wilfully, and injuriously did continue, and still doth continue, so erected, fixed, put, placed, and set in the said river and Queen's ancient and common highway as aforesaid]; by means whereof the navigation and free passage of, in, through, along, and upon the said river Severn, and the Queen's ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, to wit, at the parish aforesaid, in the county aforesaid, so that the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, re-passing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river, and Queen's ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can, go, navigate, sail, row, pass, re-pass, and labour with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and Queen's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, navigating, sailing, rowing, passing, re-passing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river Severn, and Queen's ancient and common highway there, to the great obstruction to the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

32. Forms.

— } We, two of her Majesty's justices of the peace for the county of
to wit. } , acting in and for the said county, do hereby certify that we
have this day viewed and a certain part of a common and ancient
Queen's highway leading [here describe the road], indicted at the last
assizes [or, "at the last general quarter sessions of the peace"] for the said
county, and that the said highway so indicted as aforesaid is now in good and
sufficient repair, and likely so to continue.

Given under our hands and seals this day of .

J. P. (L.S.)

K. P. (L.S.)

(56). Certificate
of two justices,
that an indicted
road is in good
repair.

Highways, Turnpike.

THE highways of the kingdom are frequently by local acts placed under the jurisdiction of trustees (a).

These highways are popularly called *turnpike roads* (b), to distinguish them from other highways. But turnpike roads are highways, and the parishes in which they are situate are liable to be indicted for their non-repair. (See *post*, p. 1068.)

By the simple system of the common law, whenever a highway was out of repair, the inhabitants of the parish were bound, by actual labour; thereon, to reinstate it in good order. Under the highway acts a ministerial agent is appointed to superintend the management of highways; actual labour is permitted to be compounded for in money; (but see the present law, *ante*, p. 1025); and a power is given to raise funds by assessment for effecting those repairs, or of other improvements to which the common-law provisions may prove inadequate; whilst by the turnpike acts an additional body are appointed, who are made, as it were, the proprietors of the road, but nevertheless upon trust for the public. They are empowered to bargain and sell, and to enter into stipulations to raise money by mortgage, and, which is the most important of their privileges, they are authorised to levy a tax, the receipts of which are to be applied to the repair and improvement of the roads which are placed under their management. (*Wellbeloved on Highways*, 180; and see *post*.)

Generally speaking, it is enacted by the local acts that they shall continue and be in force only for a limited period. But an act of Parliament is passed from time to time for the purpose of continuing them for a certain period. Some local acts are sometimes excepted from the provision of these annual acts.

Besides these local acts there are certain general acts, which, with certain exceptions which will be hereafter mentioned, (see *post*, p. 1156), are applicable to all turnpike roads, (*post*, p. 1155). These general acts are treated of in the following pages.

The powers (c) of the trustees of a turnpike road depend upon the act under which they are appointed, and the above general acts.

(a) See *post*, p. 1157.

(b) The ordinary meaning of the words "turnpike road" is, a road upon which a turnpike is lawfully erected, and the public are bound to pay tolls. (*Northam Bridge and Roads Company v. London and Southampton Railway Company*, 6 M. & W. 428.) *Et per* Lord Abinger—"A turnpike road is a road across which turnpike gates are erected and tolls taken, and such roads existed previous to the passing of the 13 Geo. 3, c. 84, and independently of that statute altogether. A 'turnpike road' means a road having toll gates or bars on it, which were originally called 'turns,' and were first constructed about the middle of the last century. Certain individuals, with a view to the repair of particular roads, subscribed amongst themselves for that purpose, and erected gates

upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions were presented to Parliament against them; and acts were in consequence passed for their regulation. This was the origin of turnpike roads. The distinctive mark of a turnpike road is, the right of turning back any one who refuses to pay toll." (*S. C.*; and see *R. v. Trustees of Great Dover-street Road*, 5 Ad. & E. 693; 3 Imp. *Burn's Justice*, 114; *Wellbeloved on Highways*, 180; and see *The Northam Bridge and Roads Company v. The London and Southampton Railway Company*, 3 Jurist, 886, V. C. where a road was held not to be a turnpike road within the meaning of a local act).

(c) See *post*, p. 1164, as to the powers of trustees.

The following arrangement has been adopted with a view of bringing all the clauses in the above general acts relating to the same matter together in the same clause; but as subjects of varied import are blended together in the same clause, frequent references only have been preferred to the repeated insertion of the same clause.

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- I. *Statutes repealed*, p. 1155.

 - II. *Provisions of certain Acts extended to all Local Turnpike Acts, and Consolidation of General Turnpike Acts*, p. 1155.

 - III. *Exceptions from Operation of Acts*, p. 1156.

 - IV. *Explanation of Words in Acts*, p. 1157.

 - V. *Trustees*, p. 1157.
 - 1. *Who are, their Qualifications and Oaths*, p. 1158.
 - 2. *Disqualified from acting when interested, or being Vic-tuallers, Lessee of Tolls, &c.*, p. 1160.
 - 3. *Not to hold Place of Profit, or be concerned in certain Contracts*, p. 1161.
 - 4. *Property vested in*, p. 1163.
 - 5. *Their powers in general*, p. 1164.
 - 6. *Their Meetings; when to be held; Proceedings at, &c.* p. 1166.
 - 7. *Their Books of Account*, p. 1168.
 - 8. *Statement of their Debts to be made out and laid before Secretary of State, &c.*, p. 1170.
 - 9. *Sinking fund to be formed for payment of Debt*, p. 1173.
 - 10. *To pay balance in hand on expiration of trust to parishes*, p. 1177.
 - 11. *Personal Liability of Trustees*, p. 1177.
 - 12. *Actions by and against*, p. 1180.

 - VI. *Officers*, p. 1182.
 - 1. *In general. Their Appointment, Removal, Accounts, and Liabilities*, p. 1182.
 - 2. *Treasurer and Clerk*, p. 1185.
 - 3. *Surveyor and Clerk*, p. 1186.
 - 4. *Collector and Receiver*, p. 1187.

 - VII. *Making and Diverting, &c. Roads, Footpaths, &c.* p. 1190.
 - 1. *Powers and Duties of Trustees as to, in general*, p. 1190.
 - 2. *Purchasing, &c., Lands, &c.* p. 1194.
 - 3. *Stopping up and selling old Roads, &c.* p. 1203.
 - 4. *Agreements to subscribe for, &c.* p. 1205.

VIII. *Repairs, &c.* p. 1206.

1. *Who liable to, in general*, p. 1206.
2. *How enforced; and herein as to Statute Duty being abolished, and of the Application of a Portion of the Highway Rate towards the Repairs*, p. 1208.
3. *Subscriptions for*, p. 1211.
4. *Materials for*, p. 1211.
5. *Mile Stones, &c., to be erected*, p. 1215.
6. *Watering Roads*, p. 1216.
7. *Contracts for Repairs*, p. 1216.
8. *Fines for not repairing*, p. 1218.

IX. *Tolls, &c.*, p. 1219.

1. *General Power to collect*, p. 1219.
2. *What Tolls payable*, p. 1220.
3. *Tolls for Overweight, and Explanation of Local Acts as to double Tolls*, p. 1220.
4. *Tolls for narrow Wheels, &c.*, p. 1225.
5. *Exemptions from Tolls*, p. 1228.
6. *Reducing or advancing Tolls*, p. 1241.
7. *Composition for*, p. 1243.
8. *Toll Houses*, p. 1243.
9. *Toll Gates and Lighting, &c.* p. 1244.
10. *Tables of Tolls and Tickets*, p. 1246.
11. *Recovery of Tolls, &c., and Penalty for Evasion*, p. 1246.
12. *Letting to Farm Tolls, and Duties and Powers of Lessee, and Collector*, p. 1248.
13. *Mortgage of Tolls*, p. 1253.

X. *Injuries, Nuisances, and Annoyances, Remedies and Punishments for, &c.* p. 1258.

1. *Ditches, Drains, &c.* p. 1258.
2. *Trees, Hedges, &c.* p. 1260.
3. *Encroachments on roads, &c.* p. 1261.
4. *Laying Rubbish, &c.* p. 1262.
5. *Gates, Windmills, &c.* p. 1262.
6. *Dogs*, p. 1263.
7. *Cattle tethered or straying, &c.*, p. 1293.
8. *Riding or driving, &c., on Footpaths*, p. 1265.
9. *Improper driving of Carriages, &c., and without Owner's Names*, p. 1265.
10. *Using Railway Carts and Locomotives on Roads*, p. 1267.

X. Injuries, Nuisances, &c.—continued.

11. *Tires of Wheels*, p. 1273.
12. *Skidpans to be used*, p. 1273.
13. *Destroying Turnpike Gates, &c.* p. 1274.
14. *Other Injuries and Annoyances*,

As Damaging Bridges, Drawing Timber, Injuring Roads, Slaughtering Cattle, Obstructing Passengers, Light in Blacksmiths' Shops, Bonfires, Baiting Bulls, Playing Games, Leaving Waggon, &c., Laying Timber, &c., Running Water, &c., Swine, &c., Leaving Block Stones, &c., Damaging, &c., Lamps, Tables of Tolls, Posts, Fences, Buildings, Drains, Scrapings of Roads, Sawpits, &c., p. 1274.

XI. *Penalty for hindering Execution of Turnpike Acts*, p. 1277.

XII. *Apprehension of transient Offenders*, p. 1277.

XIII. *Trustees may direct Prosecutions*, p. 1278.

XIV. *Property, in Indictments, to be laid in Trustees, &c.*, p. 1278.

XV. *Recovery and Application of Penalties*, p. 1278.

XVI. *Actions, Limitation of, Tender of Amends, and Costs*, p. 1281.

XVII. *Evidence, Witnesses, and Oaths*, p. 1283.

XVIII. *Forms of Proceedings*, p. 1284.

XIX. *Appeal and Certiorari*, p. 1285.

XX. *Consent to Turnpike Bill may be by Affidavit*, p. 1287.

XXI. *Forms*, see *List of*, post, p. 1287, &c.

The following contains a reference to the pages wherein the sections of the following statutes will be found noticed (a):—

3 Geo. 4, c. 126, § 1, 1155; § 2, 1155; § 3, 1155; § 4, 1155;
 § 7, 1225; § 9, 1226; § 11, 1226; § 12, 1220; § 13, 1221; § 14, 1221;
 § 15, 1221; § 16, 1223; § 19, 1222; § 20, 1247; § 21, 1224; § 22, 1224;
 § 23, 1224; § 24, 1225; § 25, 1224; § 26, 1228; § 27, 1229; § 28, 1230;
 § 29, 1230; § 30, 1232; § 31, 1220; § 32, 1236; § 33, 1239; § 35, 1223;
 § 36, 1241; § 38, 1220; § 39, 1246; § 40, 1247; § 41, 1247; § 43, 1241;
 § 44, 1242; § 46, 1245; § 47, 1255; § 48, 1255; § 49, 1255; § 51, 1188;
 § 52, 1188; § 54, 1190; § 55, 1248; § 57, 1251; § 58, 1252; § 60, 1163;
 § 61, 1158; § 62, 1158; § 63, 1159; § 64, 1160; § 65, 1161; § 66, 1160;
 § 69, 1167; § 72, 1168; § 73, 1169; § 74, 1180; § 75, 1182; § 76, 1186;
 § 81, 1253; § 82, 1206; § 84, 1194; § 85, 1195; § 86, 1197; § 87, 1202;
 § 88, 1203; § 89, 1024; § 97, 1211; § 98, 1213; § 99, 1214; § 100, 1213;
 § 101, 1214; § 102, 1214; § 103, 1214; § 106, 1217; § 107, 1217; § 108,
 1217; § 110, 1218; § 111, 1191; § 112, 1192; § 113, 1258; § 114, 1259;
 § 115, 1259; § 116, 1260; § 117, 1261; § 118, 1261; § 119, 1215;
 § 120, 1216; § 121, 1274; § 123, 1264; § 124, 1157; § 125, 1262;
 § 126, 1273; § 127, 1263; § 130, 1265; § 131, 1265; § 132, 1265;
 § 133, 1278; § 134, 1180; § 136, 1189; § 137, 1281; § 138, 1284;
 § 139, 1248; § 140, 1277; § 141, 1278; § 143, 1279; § 144, 1281;
 § 146, 1284; § 147, 1282; § 148, 1284; § 149, 1156; § 150, 1156;
 § 151, 1287; § 152, 1287; § 153, 1287.

(a) Sections 34, 59, 70, 105, 109, 128, are all either actually or inferentially repealed, and are therefore not printed.

4 Geo. 4, c. 16, § 1, 1240 ; § 2, 1240.

4 Geo. 4, c. 35, 1166.

4 Geo. 4, c. 95, § 2, 1272 ; § 5, 1227 ; § 6, 1227 ; § 7, 1242 ;
 § 10, 1241 ; § 13, 1243 ; § 15, 1267 ; § 16, 1265 ; § 17, 1223 ; § 19, 1226 ;
 § 20, 1242 ; § 21, 1223 ; § 23, 1230 ; § 24, 1236, n. ; § 26, 1228 ; § 28, 1246 ;
 § 30, 1189 ; § 31, 1188 ; § 32, 1159 ; § 33, 1159 ; § 34, 1158 ; § 35, 1160 ;
 § 36, 1160 ; § 37, 1163 ; § 39, 1167 ; § 41, 1168 ; § 43, 1182 ; § 44, 1186 ;
 § 45, 1187 ; § 47, 1183 ; § 49, 1187 ; § 50, 1189 ; § 52, 1251 ; § 53, 1251 ;
 § 54, 1251 ; § 55, 1201 ; § 56, 1215 ; § 57, 1243 ; § 58, 1252 ; § 59, 1252 ;
 § 60, 1255 ; § 61, 1177 ; § 63, 1205 ; § 65, 1192 ; § 66, 1193 ; § 67, 1260 ;
 § 68, 1207 ; § 69, 1278 ; § 71, 1215 ; § 72, 1274 ; § 73, 1266 ; § 75, 1263 ;
 § 76, 1263 ; § 78, 1216 ; § 83, 1277 ; § 87, 1285 ; § 88, 1156 ; § 89, 1305 ;
 § 90, 1156 ; § 91, 1156 ; § 92, 1156.

5 Geo. 4, c. 69, 1158.

7 Geo. 4, c. 64, § 17, 1176.

7 & 8 Geo. 4, c. 24, § 1, 1161 ; § 2, 1177 ; § 3, 1177 ; § 4, 1185 ;
 § 6, 1245 ; § 7, 1197 ; § 9, 1199 ; § 10, 1200 ; § 11, 1200 ; § 12, 1200 ;
 § 13, 1201 ; § 14, 1201 ; § 15, 1213 ; § 16, 1265 ; § 17, 1207 ; § 18, 1164 ;
 § 19, 1157 ; § 20, 1156.

7 & 8 Geo. 4, c. 30, § 14, 1272.

9 Geo. 4, c. 77, § 1, 1170 ; § 2, 1283 ; § 3, 1171 ; § 4, 1171 ;
 § 5, 1224 ; § 6, 1172 ; § 7, 1172 ; § 9, 1190 ; § 10, 1256 ; § 11, 1164 ;
 § 12, 1257 ; § 13, 1257 ; § 14, 1184 ; § 15, 1183 ; § 16, 1219 ; § 17, 1241 ;
 § 18, 1281 ; § 19, 1156 ; § 20, 1156.

1 & 2 Will. 4, c. 25, § 1, 1234 ; § 2, 1234 ; § 3, 1234 ; § 4, 1234.

2 & 3 Will. 4, c. 124, § 1, 1222 ; § 2, 1222.

3 & 4 Will. 4, c. 80, § 1, 1170 ; § 2, 1167 ; § 3, 1171 ; § 4, 1171 ; § 5,
 1172 ; § 6, 1172 ; § 7, 1172 ; § 8, 1172.

4 & 5 Will. 4, c. 81, 1221.

5 & 6 Will. 4, c. 18, § 1, 1228 ; § 2, 1228.

2 & 3 Vict. c. 46, 1242.

2 & 3 Vict. c. 47, § 10, 1235.

3 & 4 Vict. c. 39, § 2, 1166.

3 & 4 Vict. c. 51, 1240.

3 & 4 Vict. c. 88, § 1, 1235.

4 & 5 Vict. c. 33, § 1, 1239 ; § 2, 1239 ; § 3, 1239.

4 & 5 Vict. c. 51, § 1, 1212 n (a).

4 & 5 Vict. c. 59, § 1, 1208 ; § 2, 1210 ; § 3, 1211 ; § 4, 1211.

12 & 13 Vict. c. 46, § 1, 1165 ; § 2, 1165 ; § 3, 1165 ; § 4, 1165 ; § 5, 1166.

12 & 13 Vict. c. 87, § 3, 1173 ; § 4, 1173 ; § 5, 1174 ; § 6, 1174 ; § 7, 1174.

13 & 14 Vict. c. 79, § 3, 1243 ; § 4, 1174 ; § 5, 1175 ; § 6, 1165 ; § 7, 1166.

14 & 15 Vict. c. 38, § 1, 1175 ; § 2, 1176 ; § 3, 1176 ; § 4, 1236.

16 & 17 Vict. c. 135, § 3, 1176 ; § 4, 1176 ; § 5, 1176 ; § 6, 1237.

17 & 18 Vict. c. 58, § 4, 1176 ; § 5, 1176.

23 & 24 Vict. c. 73, § 3, 1175.

24 & 25 Vict. c. 46, § 2, 1175.

24 & 25 Vict. c. 70, § 1, 1268; § 2, 1268; § 3, 1269; § 4, 1269; § 5, 1270; § 6, 1270; § 7, 1270; § 8, 1271; § 9, 1271; § 10, 1271; § 11, 1271; § 12, 1271; § 13, 1271; § 14, 1272.

24 & 25 Vict. c. 126, § 1, 1235; § 2, 1235; § 3, 1235; § 4, 1235.

27 & 28 Vict. c. 75, 1275.

28 & 29 Vict. c. 83, 1272.

29 & 30 Vict. c. 105, § 2, 1244.

30 & 31 Vict. c. 121, § 2, 1163; § 3, 1177; § 4, 1267; § 5, 1211; § 6, 1170.

2. *Provisions of certain acts extended to other acts, &c.*

I. Statutes repealed.

Stat. 3 Geo. 4, c. 126, intituled, "An Act to amend the general laws now in being for regulating turnpike roads, in that part of Great Britain called England," sect. 1, enacts, That from and after the 1st day of January, 1823, the following acts, viz.

13 Geo. 3, c. 84.

14 Geo. 3, c. 14.

14 Geo. 3, c. 36.

14 Geo. 3, c. 57.

14 Geo. 3, c. 82.

16 Geo. 3, c. 39.

16 Geo. 3, c. 44.

17 Geo. 3, c. 16.

18 Geo. 3, c. 28.

18 Geo. 3, c. 63.

21 Geo. 3, c. 20.

25 Geo. 3, c. 57.

52 Geo. 3, c. 145.

53 Geo. 3, c. 82.

55 Geo. 3, c. 119.

57 Geo. 3, c. 37.

shall be, and the same are hereby repealed; and by ss. 2 & 3, nothing therein contained was to be construed to extend to the revival of any act thereby repealed, nor to prevent the recovery of penalties incurred for offences committed against the acts so repealed.

II. Provisions of certain Acts extended to all Local Turnpike Acts, and Consolidation of General Turnpike Acts.

The 3 Geo. 4, c. 126, s. 4, enacts, that all the enactments, provisions, matters, and things in this act contained, shall extend, and be deemed, construed, and taken to extend, to all acts of parliament now in force, and to all acts which shall hereafter be passed for making, widening, turning, amending, repairing, or maintaining any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters, and things as shall be expressly referred to, and varied, altered, or repealed by any such act or acts as shall be hereafter passed (a).

3 Geo. 4, c. 126, extend to all local acts, except in certain cases.

Thus, where by a local act, 26 Vict. c. lix. the word *carts* included thrashing machines, and by another section a toll of 6*d.* was imposed upon every horse drawing any waggon or cart, and there was no other clause in the act to which the above interpretation of the word

26 Vict. c. lix.

(a) See *R. v. Trustees of Great Dover-street Road*, 5 A. & E. 693, where several of the provisions in the local act were inconsistent with the enactments of this act; and it was held,

that these latter enactments were to be applied as far as they could. (See this case more fully noticed, *post*, title "*Poor*;" and see *Ridge v. Garlick*, 8 Taunt. 424.

3. *Exceptions
from operation
of acts.*

“carts” as including thrashing machines could apply. The court of Common Pleas held that the local act expressly referred to and varied the provisions of the general Turnpike Acts, 3 Geo. 4, c. 12, and made thrashing machines liable to toll. (*Ablert v. Pritchard*, *L. R.* 1 *C. P.* 212.)

Powers of 3 Geo. 4, c. 126, to extend to 4 Geo. 4, c. 95.

By 4 Geo. 4, c. 95, s. 88, all the powers, authorities, provisions, regulations, privileges, penalties, forfeitures, clauses, restrictions, matters, and things whatsoever, contained in the said recited act [3 Geo. 4, c. 126], so far as the same are not expressly altered or repealed by this act, shall extend, and be construed to extend, to operate and be in force with respect to this act, and shall be applied and put in execution, as fully and effectually to all intents and purposes, as if the same were repeated and re-enacted in the body of this act, and were made part thereof; and the said recited act and this act shall, as to all matters and things whatsoever (except as aforesaid), be considered as one act.

Powers of above acts to extend to 7 & 8 Geo. 4, c. 24.

By 7 & 8 Geo. 4, c. 24, s. 20, all the powers, authorities, clauses, provisions, penalties, forfeitures, matters, and things contained in the said acts of the third and fourth years of the reign of his present Majesty, shall, so far as the same are not altered or varied by this present act, extend, and be construed to extend to this act, and shall be applied and put in execution as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of this act, and made part thereof.

Powers of above acts to extend to 9 Geo. 4, c. 77.

By 9 Geo. 4, c. 77, s. 19, all the powers, authorities, clauses, provisions, penalties, matters, and things contained in the said acts of the third, fourth, and seventh and eighth years of the reign of his present Majesty (save and except such parts thereof respectively as are varied, altered, or repealed), shall extend and be construed to extend to this act; and all the powers, authorities, clauses, penalties, forfeitures, matters, and things contained in the said acts of the third, fourth, and seventh and eighth years of the reign of his present Majesty (except such parts thereof respectively as are varied, altered, or repealed); and all the powers, authorities, clauses, provisions, penalties, matters, and things contained in this act, shall extend and be construed to extend to every local turnpike act, and shall be applied and put in execution as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of such local turnpike act, and were made part thereof; and that the said recited acts and this act shall not be recited in any such local turnpike act, save and except as to such powers, authorities, clauses, provisions, penalties, matters, and things as shall be expressly referred to for the purpose of being varied, altered, or repealed by any such local turnpike act.

9 Geo. 4, c. 77, to extend to all local acts.

Acts not to be recited unless for purpose of being altered.

Powers of general turnpike acts extended to certain other acts.

See 1 & 2 Will. 4, c. 25, s. 3, *post*, p. 1234; and 4 & 5 Vict. c. 33, s. 2, *post*, p. 1239, as to the powers of the General Turnpike Acts being extended to these acts.

III. Exceptions from Operation of Acts.

Certain metropolitan and other turnpike roads were by the 3 Geo. 4, c. 126, ss. 149 and 150, exempted from the operation of this act, and other roads by the 4 Geo. 4, c. 95, ss. 90, 91, 92, and 9 Geo. 4, c. 77, s. 20.

IV. Explanation of Words in Acts.

5. Trustees.

Stat. 3 Geo. 4, c. 126, s. 124, after reciting that doubts may arise as to what is to be deemed the road, or the centre of the road, enacts, that where, in this or any other act of parliament relating to turnpike roads, any matter or thing is directed or forbidden to be done within a certain distance of the centre of the road, that portion of ground shall be deemed and taken to be the road which has been maintained by the trustees or commissioners as *hard* road, and repaired with stones, gravel, or other materials used in forming roads, for six months immediately preceding any offence committed against such regulations; and the centre of the road shall be the middle of such hard road, where a line being drawn along the road or a point marked, an equal number of feet of hard road, which have been so maintained and repaired as aforesaid for six months before, shall be found on each side of such line or mark: Provided always, that nothing herein contained shall authorise any person or persons to inclose or make any encroachment on any waste lands or grounds lying on the side of any turnpike road, being part of the highway, and over which the king's subjects have been used and accustomed to pass; but every person who shall inclose such waste lands and grounds, or obstruct the right of passage over the same, shall continue and be subject to the same process and penalties as if this act had not been made.

3 Geo. 4, c. 126.

What shall be deemed the road (a).

What the centre (b).

No encroachment to be made on waste lands lying on side of road.

A day, for the purposes of all local turnpike acts, is computed from 12 o'clock at night to 12 o'clock the next succeeding night. This definition refers to the taking of tolls. (See the 9 Geo. 4, c. 77, s. 16, *post*, p. 1219.)

What a day.

By 7 & 8 Geo. 4, c. 24, s. 19, the word *trustees* in the said recited acts [3 Geo. 4, c. 126; 4 Geo. 4, c. 95], or any of them, or in this act, shall be deemed and construed to extend to all or any of the trustees or commissioners appointed for the execution of any act or acts for making, amending, repairing, maintaining, or keeping in repair any turnpike road; and the word *person*, in the said recited acts, or any of them, or in this act, shall be deemed and construed to extend to and to include any one or more person or persons, and of either sex; and that the word *county*, in the said recited acts, or any of them, or in this act, shall be deemed and construed to extend to and to include riding or division; and that the word *parish*, in the said recited acts, or any of them, or in this act, shall be deemed and construed to extend to and to include ward, district, hamlet, township, or place.

7 & 8 Geo. 4, c. 24.

Trustees.

Persons.

County.

Parish.

See the interpretation clause of the Highway Act, *ante*, p. 988.

V. Trustees.

And herein—

Division of subject.

1. *As to who are, their Qualification and Oaths*, p. 1158.
2. *As to when they are disqualified from acting, from Interest, or being Victuallers or Lessees of Tolls, &c.*, p. 1160.
3. *Of the Prohibitions against their holding Offices of Profit, or being concerned in certain Contracts*, p. 1161.
4. *Of the Property vested in them*, p. 1163.
5. *Of their Powers in general*, p. 1164.
6. *Of when their Meetings are to be held; Proceedings at, &c.*, p. 1166.

(a) The term *road* means a surface over which the public have a right to pass. (*R. v. Commissioners of Llandilo District*, 2 T. R. 232.)

(b) to what shall be deemed the centre of a highway, see *ante*, p. 1044.

5. Trustees.

7. *Of the Books of Account to be kept, and what to be entered therein, &c.*, p. 1168.
8. *Of their Annual Statements of Debts, &c., being made out, and laid before Secretary of State, &c.*, p. 1170.
9. *To provide for payment of Debts by Sinking Fund*, p. 1173.
10. *To pay balance in hand on expiration of trusts to Parishes*, p. 1177.
11. *Of their Personal Liability*, p. 1177.
12. *Of Actions by and against them, &c.*, p. 1180.

1. TRUSTEES, THEIR QUALIFICATION AND OATHS.

The appointment of trustees is always made according to the local turnpike act. But they must also be qualified, according to the terms contained in the following general enactments:—

3 Geo. 4, c. 126.
Justices of peace
to be trustees.

By 3 Geo. 4, c. 126, s. 61, all his Majesty's justices of the peace for the time being acting for the county or counties through which any turnpike road now does or hereafter shall pass, shall be added to and joined with the trustees or commissioners for making, repairing, or maintaining every such turnpike road, and shall, on qualifying themselves as hereafter mentioned, have all the same powers and authorities, to all intents and purposes, as if the said justices had severally been named or elected trustees or commissioners in or under any act or acts of parliament under which such roads shall be made, repaired, or maintained.

Oath of qualification as trustees not required from justices.

By 4 Geo. 4, c. 95, s. 34, nothing in the said recited act, [3 Geo. 4, c. 126], or in this or any other act contained, shall extend or be construed to extend so as to require any justice of the peace acting for any county to take or subscribe any oath of qualification before he shall act as trustee in the execution of any act or acts for making, repairing, or maintaining any turnpike road.

Justices acting for ridings or divisions, &c., through which roads pass, shall have the like powers for making and repairing turnpike roads as justices for counties.

And by 5 Geo. 4, c. 69, after reciting the titles of stats. 3 Geo. 4, c. 126, 4 Geo. 4, c. 95, and sect. 61 of stat. 3 Geo. 4, c. 126 (p. 1157,) and that it is expedient that his Majesty's justices of the peace acting for any riding, division, or soke, should also be enabled to act as trustees (a) for the repair of turnpike roads, it is enacted, that from and after the passing of this act, all his Majesty's justices of the peace for the time being, acting for the county or counties, riding or ridings, division or divisions, soke or sokes, through any part of which any turnpike road now does, or hereafter shall pass, shall have such and the like powers and authorities for the making and repairing any such turnpike road, and be subject to the same rules and regulations, by virtue of or under the said recited acts, as any of his Majesty's justices of the peace acting for any county or counties (b).

3 Geo. 4, c. 126.
Qualification of trustees (c).

By 3 Geo. 4, c. 126, s. 62, no person who shall hereafter be chosen or appointed a trustee or commissioner, shall be qualified or capable of becoming and acting as a trustee or commissioner in the execution of any act of parliament for making, repairing, or maintaining any turnpike road, unless he shall be, in his own right, or in the right of his

(a) The word "trustees" comprehends commissioners. (7 & 8 Geo. 4, c. 24, s. 19, *supra*, p. 1157.)

(b) The word "county" includes riding or division. (7 & 8 Geo. 4, c. 24, s. 19, *ante*, p. 1157.)

(c) If a person is named in a turnpike act as one of the trustees of a turnpike road, and has acted as such, and been recognised as such trustee by the plaintiff, the judge, at the trial of a cause in which the goodness

of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to show that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such. (*Pritchard v. Walker*, 3 C. & P. 212.)

As to the penalty for acting, not being qualified, see *post*, p. 1161.

wife, in the actual possession or receipt of the rents and profits of freehold or copyhold lands, tenements, or hereditaments, of the clear yearly value of 100*l.* above reprises, or shall be heir apparent of a person possessed of freehold or copyhold lands, tenements, or hereditaments, of the clear yearly value of 200*l.* above reprises; and unless he shall, before he shall act as such trustee or commissioner, take and subscribe the oath or affirmation following, before any two or more of the trustees or commissioners appointed or to be appointed by or in pursuance of such act, who are hereby authorised and empowered to administer the same, in the words or to the effect following; (that is to say),

The form is omitted because, by the 5 & 6 Will. 4, c. 62, s. 10, in lieu of the oath or affirmation, a declaration to the same effect is to be made. (See *post*, "*Oaths*.")

Sect. 63. Nothing herein contained shall hinder or prevent any person from acting as a trustee or commissioner of any turnpike roads, any part of which are or shall be situate within ten miles of the Royal Exchange in London, who shall be possessed of personal property to the amount or value of 10,000*l.*, after payment of his debts.

By 4 Geo. 4, c. 95, s. 32, no person, who shall after the passing of this act be chosen or appointed a trustee or a commissioner by or under any act or acts for making or maintaining any turnpike road, shall act as such trustee or commissioner, unless he shall, before he shall act as such (except in administering the oath or affirmation hereinafter mentioned), take and subscribe before one or more of the said trustees or commissioners (who is and are hereby empowered to administer the same) the oath or affirmation following (that is to say). [The form of affirmation is omitted, 5 & 6 Will. 4, c. 62, s. 10, substitutes a declaration instead thereof.] And if any such person shall act (except as aforesaid) before he shall have taken and subscribed the said oath or affirmation, every such person shall, for every such offence, forfeit and pay the sum of 50*l.* with full costs of suit, to any person or persons who shall inform or sue for the same in any of his Majesty's courts of record at Westminster, by action of debt, or on the case, bill, suit, or information, wherein no essoign, protection, or wager of law, or more than one imparlance shall be allowed: Provided always, that no act or proceeding touching the execution of the said act, 3 Geo. 4, c. 126, or this act, or any act for making or maintaining any turnpike road, which shall be done or performed by any such person who shall have omitted or neglected to take and subscribe the said oath or affirmation by this act prescribed, shall be thereby impeached or rendered nugatory; but all such proceedings shall be as valid and effectual as if such person had taken such oath or affirmation previously to his having acted as such trustee or commissioner as aforesaid (a).

Sect. 33. If any person being a Quaker shall have been or shall hereafter be appointed or elected, by or under any act or acts of parliament for making, repairing, or maintaining any turnpike road, a trustee or commissioner of such road, and shall be in other respects qualified according to the provisions of the said recited act [3 Geo. 4, c. 126], it shall and may be lawful for such person, on taking and subscribing the affirmations in the said recited act and this act contained, to act as a trustee or commissioner in execution of the act or acts by or under which such person shall be appointed or elected, without being subject or liable to any penalty or forfeiture by such act or acts imposed for acting as a trustee or commissioner not having taken and subscribed the oaths therein contained.

5. Trustees.

3 Geo. 4, c. 123.

A declaration substituted in lieu of oath.

3 Geo. 4, c. 126. Qualification by personal property within ten miles of London.

4 Geo. 4, c. 95. Trustees to be sworn.

Penalty for acting without taking oath, 50*l.*

Proceedings valid, though oath omitted to be taken under recited act.

Quakers making affirmation may act as trustees.

(a) There is a similar provision where the trustee is not qualified. (3 Geo. 4, c. 126, s. 64, *post*, p. 1160.)

5. Trustees.

4 Geo. 4, c. 95.
Explaining trustees' qualification.
13 Geo. 3, c. 84.

Sect. 35. Where any person shall, previously to the first day of January, 1823, have been duly qualified according to the provisions of, and taken the oath prescribed in that behalf, by 13 Geo. 3, c. 84, or have been duly qualified according to the provisions of, and taken the oath prescribed by, any other act or acts of parliament for making, maintaining, or repairing any particular turnpike road, previously to the said first day of January, and shall have been then acting as a trustee or commissioner in the execution of such act or acts, it shall and may be lawful for such person to continue to act as a trustee or commissioner under such act or acts, without requalifying, or taking the oath prescribed in and by the said recited act of the third year of his present Majesty's reign; and although such person may not be possessed of freehold or copyhold lands, tenements, or hereditaments, or be heir apparent to any person possessing the same, to the amount required by the said recited act.

Sect. 36 related to a trustee losing his qualification to become incapable of acting, though he may have acted before January, 1823.

3 Geo. 4, c. 126.
Appointment of new trustees on vacancies.

By 3 Geo. 4, c. 126, s. 66, when and as often as any of the trustees or commissioners, save and except the justices of the peace, appointed or to be elected and appointed under any act of parliament for making, repairing, or maintaining any turnpike road, shall die, or by bankruptcy, insolvency, or otherwise, become disqualified to act, or, by writing under their hands, refuse to act in the execution of such act, it shall be lawful for the surviving or remaining trustees or commissioners, from time to time, to elect and appoint one other fit person, qualified as aforesaid, to be a trustee or commissioner, in the room of every trustee or commissioner dying or becoming disqualified, or refusing to act as aforesaid; provided that notice of the time and place of meeting of the trustees or commissioners for every such election be given by the clerk or clerks to such trustees or commissioners, by affixing the same in writing upon all the toll gates or turnpikes erected upon the said road, for which they shall act as trustees or commissioners, and by inserting such notice in one or more of the newspapers circulating in that part of the country where such road shall pass, 14 days at least before every such meeting; and every person who shall be elected and appointed a trustee or commissioner pursuant to the directions of this act, shall and may act with the surviving and remaining trustees or commissioners in the execution of such act, to all intents and purposes, as if he had been therein named and appointed a trustee or commissioner.

Notice to be given fourteen days before the meeting.

2. TRUSTEES DISQUALIFIED, WHERE INTERESTED, OR BEING VICTUALLERS, &c.

Trustees not to act where interested, or while keeping a victualling house, &c.

Or lessee of tolls.

By stat. 3 Geo. 4, c. 126, s. 64, no person appointed or to be appointed a trustee or commissioner in or by virtue of any act for repairing turnpike roads, shall be capable of acting as such in the execution of any such act, in any case where he shall be personally interested, (except as hereinafter provided), nor during the time he shall keep a victualling house, or other house of public entertainment, or who shall sell wine, cider, beer, ale, spirituous or other strong liquors by retail, or who shall be a lessee or farmer of the tolls on any turnpike road, or any part or parts thereof; and if any person, not being qualified as aforesaid, or being disqualified by any of the causes aforesaid, or not having taken and subscribed the oath hereinbefore mentioned, or, being a Quaker, not having made and subscribed the affirmation hereinbefore mentioned, shall nevertheless presume to act (a) as a trustee or

(a) In a case where one of the commissioners under a local paving act, being personally interested in the construction of a footpath opposite

his own house, attended a meeting of commissioners and spoke upon the question of the mode of constructing such footpath; it was held, on a

commissioner in the execution of any such act, every such person shall, for every such offence, forfeit and pay the sum of 50*l.* to any person or persons who shall sue for the same, to be recovered, with full costs of suit, in any of his Majesty's courts of record at Westminster, by action of debt or on the case, or by bill, plaint, suit, or information, wherein no essoin, protection, wager of law, or more than one imparlance shall be allowed; and the person so sued or prosecuted shall prove that he is qualified and not disqualified as aforesaid, or otherwise shall pay the said penalty, without any other proof or evidence on the part of the prosecutor, than that such person had acted as a trustee or commissioner in the execution of any act for repairing turnpike roads: Provided nevertheless, that no act or proceeding touching the execution of any such act, which shall be done or performed by any such unqualified or disqualified person previously to his being convicted of the offence before mentioned, shall be thereby impeached or rendered nugatory; but all such proceedings shall be as valid and effectual as if such person had been duly qualified: Provided always, that no mortgagee or assignee of any mortgage or other security, or any lender of money upon the credit of the tolls, or receiving interest thereout for the same, shall on that account only be deemed unqualified to act as a trustee or commissioner in the execution of any such act; and any trustees or commissioners appointed or to be appointed under any such act, who are or shall be in the commission of the peace, may act as such justices of the peace in the execution of any such act, notwithstanding their being such trustees, or commissioners, except in such cases only wherein they shall be personally interested otherwise than as a trustee, commissioner, mortgagee, assignee, lender of money, or holder of any security on the credit of the tolls granted by any such act.

By 7 & 8 Geo. 4, c. 24, s. 1, reciting the titles of 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95; and that such acts require to be further explained and amended; it is enacted, That no trustee of any turnpike road shall be deemed or taken to be personally interested, by reason of his having acted as a trustee in ordering the making, altering, or diverting any turnpike road over or contiguous to any lands, tenements, or hereditaments in his possession or occupancy, or by reason of his having received any sum or sums of money out of the tolls of any such road as or by way of purchase-money, damages, rent, recompense, or satisfaction agreed upon or awarded to such trustee for any lands, tenements, or hereditaments, or any timber or wood, or materials purchased or taken for the purpose of making, diverting or altering, or for the use of the road for which he shall act as a trustee, or for a repository for materials to be used thereon, or for the damage done to any inclosed or private lands or grounds of any such trustee, in taking materials therefrom, or in carrying or conveying them over the same.

3. TRUSTEES NOT TO HOLD PLACE OF PROFIT, OR BE CONCERNED IN CERTAIN CONTRACTS.

By 3 Geo. 4, c. 126, s. 65, no trustee or commissioner of any turnpike road shall, from and after this act shall be in force, enjoy any office or place of profit (*a*) under any act of parliament in execution of

5. Trustees.

3 Geo. 4, c. 126.
Penalty for acting not being qualified, 50*l.*

Person sued to prove his qualification.

Proceedings not to be impeached on account of disqualification.

Mortgagees on the tolls not disqualified on that account.

7 & 8 Geo. 4, c. 24.
Owners of estates, &c., not to be disqualified as interested persons.

3 Geo. 4, c. 126.

motion for a new trial, that this was evidence to go to the jury of *an acting* as a commissioner, so as to subject him to the penalty. (*Charlesworth v. Rudgard*, 1 C. M. & R. 498.)

(*a*) A trustee, who accepted the office of treasurer, but allowed another person to receive the tolls, and never

made any profit of it himself, is liable to the penalty, if the office yielded a profit. (*De Lane v. Hilloat*, 9 B. & C. 310.) *Et per Bayley, J.*—"The question in this case is not whether the defendant himself made a profit of the office; but whether the office was one which enabled him to make a profit.

5. *Trustees.*

3 Geo. 4, c. 126.
Trustees not to
hold places of pro-
fit or be concerned
in contracts (a),

or receive money
out of the tolls to
his use.

Penalty for, 100%.

Contracts void.

Acts previous to
conviction valid.

Prohibition not
applicable to
purchase-money.

which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in, any contract or bargain for making or repairing, or in any way relating to the road for which he shall act, or for building or repairing any toll house, toll gate, or weighing engine thereon, or for supplying any materials for the use thereof; nor shall any such trustee or commissioner let out for hire (b) any waggon, wain, cart, or other carriage, or any horse, cattle, or team, for the use of any turnpike road for which he shall act as a trustee or commissioner (b); nor by himself, or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road; and if any person, after having been appointed or elected a trustee or commissioner of any turnpike road, shall, without having first duly resigned such office at some meeting of the trustees of the road for which he shall have been elected or appointed, hold any such office or place or be concerned in any such contract or bargain, or shall sell any such tools or implements, or let out for hire any waggon, wain, cart, or carriage, horse, cattle, or team, or receive any money out of the tolls as aforesaid, every trustee or commissioner so offending shall, for every such offence, forfeit and pay the sum of 100% to any person or persons who shall sue for the same, and shall, from and after the conviction of any such offence, be incapable of acting as a trustee or commissioner of any turnpike road; and all acts, orders, matters, and things made or done as a trustee or commissioner by the party so convicted, shall from thenceforth be null and void, to all intents and purposes, and all and every such contract and bargain shall be, and the same is hereby declared to be void, and shall not be enforced against or carried into effect by the other trustees or commissioners entering into the same: Provided always, that all acts, orders, matters, and things, made or done by such trustee or commissioner previously to his being convicted of any such offence, shall be good, valid, and effectual; and further provided, that nothing in this enactment contained shall extend, or be deemed or construed to extend, to any trustee or commissioner who shall receive any sum or sums of money paid out of the tolls of any turnpike road, as or by way of purchase-money, damages, rent, recompense, or satisfaction agreed upon or awarded to such trustee or commissioner, for any lands, grounds, tenements, or hereditaments, purchased or taken for the purpose of diverting or altering, or for the use of the turnpike road for which he shall act as a trustee or commissioner, or for a repository for materials to be used thereon, or for the damage done to any inclosed or private grounds of any such trustee or commissioner, in taking materials therefrom, or in carrying or conveying them over the same, or to prevent any such trustee or commissioner from selling

Now, if the available balance in the hands of the clerk were such, that it might reasonably be expected that a man would make a profit of it, it must be considered an office of profit." *Et per Littledale, J.*—"If the average balance was so small that a banker would not allow interest for it, the office in that case might not, perhaps, be considered an office of profit; but if it amounted to a sum for which a banker would allow interest, it must be considered an office of profit."

(a) See note a, p. 1161.

(b) Where H. had contracted with

the trustees of a turnpike road to make certain improvements on the road, and he agreed to perform the same for a specific sum; one of the trustees afterwards agreed with A. to let him his horses and cart at the rate of 5s. per day; and he did so let them, and they were used on that part of the road which was agreed to be improved by A.; it was held, that the trustee was liable to the penalty imposed by the above section. (*Towsey v. White*, 5 B. & C. 123. See now the 4 Geo. 4, c. 95, *post*, p. 1163.)

or disposing of, for the use of the turnpike road, any materials, or any timber grown or growing on the land or grounds of such trustee or commissioner.

5. Trustees.

By 4 Geo. 4, c. 95, s. 37, reciting that, in and by the said recited act, [3 Geo. 4, c. 126], it is amongst other things provided, that no trustee or commissioner shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act, or for building or repairing any toll house or toll gate, or weighing engine thereon, or for supplying any materials for the use thereof, nor shall let out for hire any waggon, wain, cart, or other carriage, or any horse, cattle, or team (a), for the use of any turnpike road for which he shall act as trustee or commissioner, nor by himself, or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit, out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road (a); and in and by the said recited act any trustee or commissioner offending in any of the cases aforesaid is thereby made liable to pay the penalty of 100*l.*, it is enacted, that no person or persons, being a trustee or commissioner, or trustees or commissioners of any turnpike road, shall be liable to and forfeit the said penalty of 100*l.*, or any other penalty or forfeiture, for or by reason of his or their being only a proprietor or proprietors, or holder or holders of any share or shares, in any canal or railway company which shall contract with the trustees or commissioners of the road for which such person or persons shall act as a trustee or commissioner, or trustees or commissioners, for the carriage or conveyance of any materials for the repair of such road.

4 Geo. 4, c. 95. Trustees having shares in canal companies, &c., which shall contract for conveyance of materials for roads, not liable to penalty on account of such contract.

By the same act, s. 78, trustees may enter into certain contracts for amending roads. (See *post*, p. 1246.)

Contracts for amending roads.

By 3 Geo. 4, c. 126, s. 84, trustees may purchase lands, &c., for making or improving the roads. (See *post*, p. 1194.)

By s. 100 of the same act, the trustees are empowered to purchase land for the purpose of digging materials thereon. (See *post*, p. 1213.)

Contracts for materials.

30 & 31 Vict. c. 121, s. 2. No trustee or commissioner of any turnpike road shall be liable to any penalty or forfeiture by reason of his being a proprietor or holder of a share in any gas company or water company which contracts with the trustees or commissioners of such turnpike road for the supply of gas or water for the purposes of such road, or of the toll houses thereon.

30 & 31 Vict. c. 121. As to trustees of turnpike roads holding shares in companies which contract to supply gas, &c. to roads.

4. PROPERTY VESTED IN TRUSTEES.

The trustees have no interest in the soil of the road; (*Davison v. Gill*, 1 East, 69; *R. v. Mersey Navigation*, 9 B. & C. 95; *Id.* 114); and the express provisions of the 7 & 8 Geo. 4, c. 24, s. 18, (*post*, p. 1164), mines are declared to belong to the original owner of the soil.

Trustees no interest in soil.

Some property, however, does vest in them; thus, by 3 Geo. 4, c. 126, s. 60, it is enacted, that the right, interest, and property, of and in all the toll gates and toll houses, weighing machines, and other erections and buildings, lamps, bars, toll boards, direction boards, mile stones, posts, rails, fences, and other things which shall have been, or shall be erected and provided in pursuance of any act of Parliament for making turnpike roads, with the several conveniences and appurtenances thereunto respectively belonging; and the materials of which the same shall consist, and all materials, tools, and implements which shall be provided for repairing the said roads, and the scrapings of the said roads, shall be vested in the trustees or commissioners acting in pursuance of such act for the time being, and they

3 Geo. 4, c. 126. The property of toll-houses, &c., vested in trustees.

Scrapings of roads.

(a) See *Towsey v. White*, 5 B. & C. 123; *ante*, 1162 n. (b).

5. Trustees.

3 Geo. 4, c. 126.
Actions may be
brought in name
of clerk (a).

Property may be
described as the
clerk's.

Sale of toll houses,
&c.

Tolls.

7 & 8 Geo. 4, c. 24.
Minerals under
road to belong to
original proprie-
tors of land.

Rights of pastur-
age.

Trustees' general
powers.

9 Geo. 4, c. 77.
Bonds, contracts,
&c., to remain in
full force notwith-
standing the re-
peal of any act.

are hereby authorised and empowered to apply and dispose of the same as they shall think fit, and to bring or cause to be brought, any action or actions, and to prefer and prosecute, or order and direct the preferring and prosecuting of any informations or indictments, against any person or persons who shall dig up, break, or pull down, steal, take, or carry away, spoil, destroy, injure, or damage any of the toll gates, or toll houses, weighing machines, or other erections or buildings, lamps, bars, toll boards, direction boards, mile stones, posts, rails, fences, and other things, or any of the conveniences and appurtenances thereto belonging, or any of the tools, implements, or materials aforesaid, or shall interrupt them, the said trustees or commissioners, or any of their officers, in the possession thereof, in all which proceedings it shall be sufficient to state generally such articles to be the property of the clerk for the time being to the said trustees or commissioners.

The 57th, 58th, and 59th sections of the 4 Geo. 4, c. 95, relate to the sale and disposal of unnecessary toll houses and property vested in trustees, &c. See the sections, *post*, pp. 1247, 1252.

By 9 Geo. 4, c. 77, s. 16, the tolls to be collected on any turnpike road are to be vested in the trustees. (See *post*, p. 1219.)

By 7 & 8 Geo. 4, c. 24, s. 18, all mines of iron, tin, lead, copper, coal, and other minerals whatsoever, which shall be discovered or found in or under any land to be used for any turnpike road, shall be, and they are hereby reserved to the person, body politic, corporate, or collegiate, who would have been seised of, or entitled to the same, in case the act for making such road had not been passed, with liberty for him or his agents or servants to dig for, mine, and work the same in such manner as is usual for carrying on works of that kind in the county, district, or place where such mines shall be found, in as full and as ample a manner as if the said land had not been taken and appropriated for the purposes aforesaid, so that in the working thereof no damage shall be done to such road, or any part thereof.

This provision is only an affirmance of the common law; the freehold of the road, (subject to the right of way), and the mines under it, are vested in the owner of the soil, who may maintain actions against trespassers, &c. (1 *Roll. Ab.* 392; 1 *Price*, 143; *Lofft*, 358; *Lade v. Shepherd*, 2 *Stra.* 1004; *Goodtitle v. Alker*, 1 *Burr.* 133; *Harrison v. Parker*, 6 *East*, 154.)

See the 4 Geo. 4, c. 95, s. 75, where provision is made for the preservation of the rights of pasturage along the sides of turnpike roads, *post*, p. 1182.

5. TRUSTEES' POWERS IN GENERAL.

To state all the powers of the trustees would be to repeat nearly all the provisions of the turnpike acts, which will be found dispersed throughout this title.

Trustees, as we have seen, (*ante*, p. 1150,) are appointed under local statutes which have but a temporary existence, and an order, therefore, made by them would, unless otherwise enacted by statute, cease to be effective at the expiration of the term of the act; but a permanent effect is given to their acts, by 9 Geo. 4, c. 77, s. 11, which enacts, that all conveyances, bonds, covenants, agreements, contracts, and securities made or entered into by any person or persons, to or with the trustees for carrying any local turnpike act into execution, or by any other person or persons, on behalf of the said trustees, according to the provisions of any such act, shall remain in full force and effect, notwithstanding the expiration or repeal of such act, and shall be and continue available in all courts, and before all judges and justices

(a) As to this provision, see further 3 Geo. 4, c. 126, s. 74, *post*, p. 1180, and cases there collected.

having jurisdiction, as the case may require, until the same are fully satisfied and performed, on account and for the benefit of the trust to be created by any subsequent act for maintaining the same turnpike road or any part thereof.

By the 9 Geo. 4, c. 77, s. 12 (*post*, p. 1257), the trustees under any local act may receive in and cancel mortgages granted under the trusts of a former act, &c.

By 12 & 13 Vict. c. 46, s. 1, it is enacted, that where the general annual meetings of the trustees of two or more turnpike roads have for three years (*a*) next preceding such notice as next hereinafter mentioned been held at the same place, or at places distant not more than 10 miles from each other, two or more of the trustees of each of such roads may call a joint meeting of the trustees of such several roads, at a place to be specified in the notice of such meeting, for the purpose of taking into consideration a proposition for the union of the trusts of such several roads, of which meeting and of the purpose thereof 21 days' notice shall be given, in like manner as notice of the general annual meeting of the trustees of such respective roads is by law required to be given; and if at such meeting it shall appear to a majority, being not less than two-thirds of the trustees of each of the trusts so proposed to be united then present, that such union is expedient, and that the same can be effected without injury to the interests of any of the creditors of any of the said trusts, the said trustees may resolve to unite the same, and shall in such case, within 20 days after such meeting, send notice of such resolution, together with a report of the reasons for which the said union is considered by them expedient, and a statement of the income and expenditure of all the trusts proposed to be so united, and of the debts of every such trust, to all the creditors of the same, such notice and report to be delivered at the usual place of abode of every such creditor, or at the bank or other place where the interest on the debt due to such creditor is usually paid, with instructions to forward the same to such creditor; and whenever the assent in writing to the proposed union of the creditors of each of the said trusts to whom three-fifths in amount of the debts due from such trust shall be owing, or of persons legally qualified to assent in behalf of such creditors, shall have been obtained, the union of the said trusts, together with the assents and the reports and accounts on which such union is founded, shall be registered in the office of the clerk of the peace in every county through which the roads of such united trusts pass; and from and after the date of such registration the said trusts shall become and continue one united trust, and all the trustees of every trust so united shall be trustees of the said united trusts.

Sect. 2. That every such trust shall be called and known as "The United Trust of Roads," and shall be subject to all the liabilities of such trust so united, and be entitled to all the tolls, profits, and other property of each such trust, and all payments shall be made from the common fund of the said trusts so united; and all the provisions of the general turnpike acts shall be applicable to such united trust.

Sect. 3. Provided always, that all special provisions in any of the said acts as to the amount of tolls or exemptions, or other arrangements respecting any particular portion of any one of such roads, shall be held to apply to that road only, and not to the whole united trust.

Sect. 4. Provided also, that nothing in this act contained shall extend or be construed to extend to affect, destroy or alter any right or interest of any person to or in any office under any turnpike trust to which such person may have been lawfully entitled before the passing of this act.

5. Trustees.

9 Geo. 4, c. 77.

12 & 13 Vict. c. 46.
Union of turnpike trusts.

Trustees of several turnpike roads may hold joint meetings, and if deemed expedient to two-thirds of trustees present, trusts may be united, on assent being obtained from creditors.

United trusts subject to liabilities and entitled to tolls of each trust so united.

Special provisions in said acts to apply only to the particular road.

Nothing to affect rights, &c., of persons to offices under turnpike trusts.

(a) This restriction of three years is repealed, 13 & 14 Vict. c. 79, s. 6.

5. *Trustees.*

12 & 13 Vict. c. 46.
Meetings of united
trusts.

Extent of act.

13 & 14 Vict. c. 79.
For facilitating
the union of
divisions or dis-
tricts into one
trust.

Sect. 5. That any trust so united may hold its subsequent meetings at any place at which any of the said trusts might have held its meetings prior to such union, and that after the expiration of 3 years (a) may in like manner, and under the same conditions, unite with any other trust, trusts, or united trust meeting at the same.

Sect. 6. That this act shall not extend to Scotland or Ireland.

And by 13 & 14 Vict. c. 79, s. 7, it is enacted, that every division or district formed under any act by which any turnpike trust is constituted shall, for the purposes of determining upon and effecting such union as aforesaid, be entitled to act as if it were a separate trust, and may as such, subject to all the provisions of the act to facilitate the union of turnpike trusts, and in the manner and under the conditions therein provided, unite with any or all of the other divisions or districts in the same trust, or with any other trust or united trust; and if united with any other trust or united trust, the act by which the trust is established to which any such division or district shall belong, save and except such parts of the same as may require the joint action of the division or district separated with the other divisions or districts from which it shall be separated, and save and except such parts as shall relate exclusively to such other divisions or districts, shall be to all intents and purposes the act constituting the trust for the said division or district thus separated from the other divisions or districts formed under the same act.

Meetings of trust-
tees.

3 & 4 Vict. c. 39.
Where sufficient
number do not
attend on day
appointed for first
meeting of trust-
tees, what to be
done.

6. MEETINGS OF TRUSTEES, WHEN TO BE HELD. PROCEEDINGS AT, &C.

By the 3 & 4 Vict. c. 39, it is enacted that where a sufficient number of the trustees or commissioners of any turnpike road shall not meet on the day appointed by any such act or acts respectively for their first meeting, or shall not meet on the day appointed by adjournment for their meeting, or for want of a proper adjournment, by which means, or by some or one of them, the intent of the said act or acts may be frustrated, in all or either of the said cases it shall be lawful for so many of the said trustees or commissioners as shall meet, or the major part of them, or in case no such trustee or commissioner shall be present, for their clerk or clerks, or in case of the death, resignation, absence, incapacity, neglect, or refusal of such clerk or clerks, for any five or more of such trustees or commissioners to cause notice in writing to be affixed on all the turnpike gates which shall be then erected on the said respective roads, or if no turnpike gate shall then be erected, to cause the like notice to be affixed in the most conspicuous place in one of the principal towns or places nearest to which the roads directed to be repaired do lie, and also in some public newspaper circulated in the county in which the road shall be situate, at least 10 days before the intended meeting, appointing such trustees or commissioners to meet at the place where the preceding meeting was appointed to have been held, or at the place directed for the first meeting of such trustees or commissioners, if no such preceding meeting shall have been held; and the said trustees or commissioners, when met in pursuance of such notice, shall and may and they are hereby required to proceed and carry such act or acts into execution in the same and in as ample and full a manner to all intents and purposes as they might or could have done if no such neglect had happened.

4 Geo. 4, c. 35.
Where trustees
cannot meet on
day appointed for
their first meet-
ing, the day being
antecedent to the

Stat. 4 Geo. 4, c. 35, enacts, that in all cases where the trustees or commissioners appointed by any act or acts of parliament have not been or shall not be able to meet on the day appointed for their first meeting by any such act or acts, by reason that the day appointed for such meeting has been or shall be antecedent to the passing of such

(a) This restriction of three years is repealed, 13 & 14 Vict. c. 79, s. 6.

act or acts, it shall and may be lawful for 3 or more of the said trustees or commissioners appointed to execute such act or acts to meet at the place appointed by such act or acts for the first meeting of such trustees or commissioners, on the 14th day after the passing of such act or acts, or of this act; and every such meeting shall be as good, valid, and effectual as if such trustees or commissioners had met in pursuance of the act or acts of parliament which they are appointed to carry into execution.

By 3 Geo. 4, c. 126, s. 69, all trustees and commissioners of every turnpike road or roads shall, and they are hereby required to hold a general meeting of the trust for which they shall respectively act, on a day to be by them, or any 3 or more of them, appointed, in the months of April, September, or October [altered by 3 & 4 Will. 4, c. 80, s. 2, to on or before 25th March, *infra*]; of which meeting 21 days' notice shall be given, by inserting the same in some newspaper or newspapers usually circulating in the county or counties in which the road or roads, in respect whereof such meeting shall be held, lie or are situated, which said meeting shall be called or known as The General Annual Meeting of the Trustees or Commissioners; and at such meeting the trustees or commissioners assembled, shall elect a chairman for the purposes thereof, and shall also audit their accounts, and report the state of the road or roads under their care and superintendence.

By 3 & 4 Will. 4, c. 80, s. 2, from and after the expiration of the present year, the trustees and commissioners of every turnpike road shall hold their general annual meeting on or before the 25th day of March in every future year, and not at any other time, any thing in the said recited acts, or in either of them, to the contrary notwithstanding.

By 4 Geo. 4, c. 95, s. 39, the trustees or commissioners for executing any act for making or maintaining any turnpike roads shall and may from time to time meet at such time and place on or near their respective roads as to them shall seem convenient, and may adjourn themselves to meet at any place or places, and at such time or times as the said trustees or commissioners, or the major part of them present at any meeting, shall appoint; and at all their several meetings the trustees or commissioners shall pay and defray their own expenses, except any sum not exceeding 10 shillings per diem for the use of the room wherein they shall meet; and all orders and determinations of the trustees or commissioners in the execution of any such act shall be made at meetings to be held in pursuance thereof, or of the said recited act [3 Geo. 4, c. 126] and this act, and not otherwise (except in the cases otherwise particularly provided for by the said recited act or any such act for making or repairing turnpike roads); and that no order or determination shall be made unless the major part of the trustees or commissioners present shall concur therein; and that all acts, orders, and proceedings relating to any such act, or the said recited act and this act, which are directed to be had, made, done, or exercised by or before the said trustees or commissioners, and all the powers and authorities vested in them generally, shall and may be had, made, done, and exercised by the major part of the trustees or commissioners who shall be present at the respective meetings to be held by virtue of any such act or this act, the whole number present not being less than 3; (except in such cases where any other number is by any local act, or the said recited act, or this act, named for any particular or special purpose); and that all acts, orders, or proceedings had, made, or done, by or before such 3 trustees or commissioners, shall have the same force and effect, and be binding and conclusive on all persons, and to all intents and purposes whatsoever, as fully and effectually as if the same were had, made, done, or executed by or before all the said trustees or commissioners; and that a chairman shall

5. Trustees.

4 Geo. 4, c. 35.
passing of the act,
any three of such
trustees may
meet on four-
teenth day after
passing of act.

3 Geo. 4, c. 126.
General annual
meetings to be
held.

3 & 4 Will. 4, c. 80.

4 Geo. 4, c. 95.
Trustees may
hold meetings
when they think
proper,
and may adjourn
the same.

Expenses of such
meetings.
Orders at.

Chairman.

5. *Trustees.*

4 Geo. 4, c. 95.

Votes.

Orders, how re-
voked.Proviso as to
expense of rooms.How meetings on
emergencies to be
held.

and may in the first place be appointed at every meeting to be held by virtue and for the purposes of any such local act, or the said recited act, and this act, who in case of an equal number of votes (including the chairman's vote) shall have the casting or decisive vote; and that no order or determination at any meeting of the said trustees or commissioners, once made, agreed upon, or entered into, shall be revoked or altered at any subsequent meeting, unless notice of the intention to make such revocation or alteration shall have been given by 3 or more trustees or commissioners, by writing under their hands, to the clerk to the said trustees or commissioners, at a previous meeting holden for the same road, and entered in the book of proceedings of such meeting, and unless notice signed by any 2 or more trustees or commissioners shall have been affixed on all the turnpike gates then erected upon such road, 21 days at least before such meeting, nor unless such revocation or alteration shall be agreed to be made by a greater number of trustees or commissioners than concurred in the making of any such order or determination: Provided always, that nothing herein contained, prohibiting or restraining trustees from expending more than 10s. *per diem* for the use of the room wherein they shall meet, shall extend to the trustees or commissioners of any road within 5 miles of the Royal Exchange in London; but such last-mentioned trustees or commissioners may expend any sum not exceeding 20s. for the use of such room.

See *post*, p. 1183, as to this section being taken in conjunction with sect. 43 of the above act.

Sect. 41. If at any time it shall be thought necessary, for the better execution of any act of parliament for making or maintaining any turnpike road, that the trustees or commissioners of such road should meet before the time to which any meeting may be adjourned, it shall and may be lawful for any 2 or more of such trustees or commissioners (or for the clerk to the said trustees or commissioners, by an order in writing, signed by one or more of them) to give notice of such earlier meeting by advertisement in some newspaper circulated in the neighbourhood of such road, and affixed on all the turnpike gates then standing on such road; in which notice shall be expressed the time, place, and purpose of such earlier meeting; (such time not being less than 14 days after publication of the said notice); and all the orders and determinations of the trustees or commissioners, at all such meetings, shall be as valid as if the same had been done at any other meeting of trustees or commissioners held by virtue of the said recited act or this act, or the act under and by virtue of which they shall act as trustees or commissioners: Provided always, that no other business than what shall be specified in such notice shall be transacted at any such meeting.

See *infra*, as to the proceedings of the trustees or commissioners, together with their names, being entered in a book to be kept for that purpose.

See, also, as to statements of debts, &c. being laid before annual meetings, and as to clerks to trustees preparing estimates for annual meetings, *post*, p. 1171, &c.

7. BOOKS OF ACCOUNT TO BE KEPT, WHAT TO BE ENTERED THEREIN, AND AUDIT.

3 Geo. 4, c. 126.
Proceedings to be
entered in books,
which shall be
open for inspection.

By 3 Geo. 4, c. 126, s. 72, all orders and proceedings of the trustees or commissioners of every turnpike road, together with the names of the trustees or commissioners present at every meeting, shall be entered in a book or books to be kept by the clerk to the said trustees or commissioners for that purpose, and be signed by the chairman of (a)

(a) See *Southampton Dock Company v. Richards*, 1 *Scott's N. L.* 219, where the directors under a dock act were required to keep a regular minute and

the meeting or meetings at which such orders or proceedings shall be from time to time made or had; and that such book or books shall be open at all seasonable times to the inspection of any of the trustees or commissioners, without fee or reward; and such orders and proceedings so entered and signed by the chairman of (a) such meeting or meetings as aforesaid, shall be deemed and taken to be original orders and proceedings; which said book or books, as well as the book or books in which the oath or affirmation directed to be taken by the said trustees or commissioners shall be entered, and also the book or books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence (b) in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits, and actions whatsoever. (See *post*, 1283.)

5. Trustees.

3 Geo. 4, c. 126.

Sect. 73. The trustees and commissioners of every turnpike road shall, and they are hereby required from time to time, and at all times, to order and direct a book or books to be provided and kept by their clerk for the time being; in which book or books such clerk shall enter, or cause to be entered, true and regular accounts of all sums of money received, paid, laid out, and expended, for or on account of the road for which such clerk shall act, and of the several articles, matters, and things for which such sums of money shall have been disbursed, laid out, and paid; and such book or books shall, at all seasonable times, be open to the inspection of the said trustees or commissioners, or any creditor or creditors on the tolls collected and taken on the road to which such books relate, without fee or reward; and the said trustees, or commissioners and creditors, or any of them, shall or may take copies of or extracts from the said book or books or any part or parts thereof, without paying anything for the same; and the said book or books shall be produced by the said clerk at all meetings of the said trustees or commissioners: and in case any clerk shall refuse to permit, or shall not permit any of the said trustees or commissioners, or any such creditor, to inspect any such book or books, or to take such copies or extracts as aforesaid, or in case such clerk shall refuse or neglect to produce such book or books, at any meeting of the said trustees or commissioners, such clerk shall forfeit and pay any sum of money not exceeding 5*l.*, to be levied and applied in the same manner as other penalties are hereby directed to be levied and applied (by sect. 141, *post*, p. 1278).

Books of account to be kept, and to be open to inspection of trustees and creditors (c).

Penalty on refusing inspection.

See also the provisions of the 9 Geo. 4, c. 77, s. 2, as to the entries being open to inspection, and the penalty for not granting it; as also to such entries being evidence, *post*, p. 1283.

A local turnpike act directed that the trustees should keep books in which they should enter their accounts, and also their orders and proceedings; and that *all persons* should have access to such entries. By a subsequent local act it was directed that the trustees should keep a book in which they should enter their accounts, which book should be open to the inspection of the trustees or of any creditor on the tolls. The General Turnpike Act, 3 Geo. 4, c. 126, s. 73, re-enacted the

entry of the orders and proceedings at every meeting of the directors, which was to be signed by the chairman at each respective meeting; and it was held, that a signature by the chairman at a subsequent meeting at which the minutes of the former meeting were read over and confirmed was a sufficient compliance with the act.

(a) See note (a) p. 1168.

(b) These words seem to make such books evidence of everything upon the face of them. (See *Sheffield and Manchester Ry. Co. v. Woodcock*, 7 M. & W. 574.)

(c) And see 30 & 31 Vict. c. 121, s. 4 (*post*, p. 1267), as to inspection by ratepayers.

5. *Trustees.*

3 Geo. 4, c. 126.

latter provision as to all turnpike road accounts; and sect. 72 directs that all trustees of turnpike roads should keep a book of their orders and proceedings, which should be open to the inspection of *any of the trustees*, and should be read as evidence in courts as there directed. That act also provides, that the enactments therein contained shall extend to all other turnpike acts, except where by that act it is otherwise ordered:—Held, that these clauses of the general and of the second local act superseded the provisions of the original act, and limited the power of inspection at first given to the whole public, confining it to trustees, and to trustees and creditors in the respective cases of orders and accounts. (*R. v. Trustees of North Leach and Witney Roads*, 5 B. & Ad. 978.)

To ground an application for a mandamus to inspect books, quære, whether it is sufficient to show that the party entitled to inspect demanded liberty to do so, that his claim was disputed, but inspection offered him as a favour, and that he refused to accept it otherwise than as a right. (*Per Denman, C. J., S. C.*)

It may be useful to state the following case here:—By statute incorporating a canal company, the affairs of the company were to be managed by a committee, who were authorised to appoint a clerk for better carrying into execution the purposes of the act. The committee were required to enter in books an account of their disbursements, receipts, and transactions, and the books were to be open at all seasonable times to the inspection of the proprietors. A proprietor applied to the clerk for an inspection of the books which were under his charge. The clerk said he would refer the demand to the committee. The proprietor attended the committee, and there repeated his request; and the chairman said they would take time to consider it. Ten days afterwards the proprietor applied again to the clerk, who refused the inspection. On motion for a mandamus to the company to allow inspection of the books:—Held, that there had been no sufficient refusal by the committee to warrant the application:—Semble, that a party applying for a mandamus to give inspection of such documents, ought to show that when he demanded the inspection, he stated the object for which he wanted it. (*R. v. Wilts and Berks Canal Company*, 3 A. & E. 477.)

30 & 31 Vict. c. 121.
Provision for
audit of accounts
in cases herein
named.

30 & 31 Vict. c. 121, s. 6. Where at any general annual meeting of the trustees of a turnpike road 3 or more trustees shall state in writing their desire that there should be an audit other than the audit by the trustees themselves of the accounts of such trust, the clerk of such trust shall apply to the principal secretary of state for the home department for an audit of the accounts of that year, and the secretary of state for the home department shall direct an audit accordingly, and shall make such regulations for holding such audit as shall seem to him desirable: Provided always, that the expenses of or incident to such audit shall be deemed expenses incurred by the trustees of the turnpike road.

8. ANNUAL STATEMENT OF DEBTS, &c. TO BE MADE OUT, AND TO BE TRANSMITTED TO THE SECRETARY OF STATE, &c.

3 & 4 Will. 4, c. 80.
Annual statement
of debts and ac-
counts to Secre-
tary of State.

By 3 & 4 Will. 4, c. 80, intituled, “An Act requiring the annual statements of trustees or commissioners of turnpike roads to be transmitted to the Secretary of State, and afterwards laid before Parliament,” after reciting 3 Geo. 4, c. 126, by which it was enacted, that all trustees and commissioners of every turnpike road or roads should hold a general meeting of the trust for which they should respectively act on a day to be appointed in the months of April, September, or October in every year, which said meeting should be called or known as “the general annual meeting of the trustees or commissioners,” and at such meeting the trustees or commissioners assembled should elect a chairman for the purposes thereof, and should also audit the

several accounts of the said trusts, and report the state of the roads under their care and superintendence, and as soon as such accounts should be allowed and signed, the clerk to the trustees or commissioners holding such meeting should forthwith make out a statement of the debts, revenues, and expenditure received or incurred on account of the trust for which the meeting should be held, in the form contained in the schedule annexed to the said act, which said statement should be submitted to the trustees or commissioners assembled at such meeting, and when approved by the majority of them should be signed by the chairman of the said meeting, and should within 30 days thereafter be transmitted to the clerk of the peace of the county in which the road or the major part thereof to which the said statement related should lie; and it was further enacted, that on such statement being received by the said clerk of the peace he should produce the same to the justices assembled at the quarter sessions to be held next after the receipt thereof, and that such statement should also be registered and kept amongst the records of the quarter sessions of the county for which such clerk of the peace should act; and reciting 4 Geo. 4, c. 95, s. 42, by which it was enacted, that where by any act of Parliament a general annual meeting of the trustees acting in execution of such act should be appointed to be held at any other time of the year than in the said months of April, September, or October, and the said trustees should have held such meetings under the authority of such act, it should be lawful for such trustees to continue to hold the said general annual meetings at the time mentioned and directed in the act by virtue of which they should be appointed, instead of in the said months of April, September, or October, anything in the first said recited act contained to the contrary notwithstanding: and whereas it is expedient that such annual statements should be transmitted to one of his Majesty's principal secretaries of state, for the purpose of being revised, and afterwards laid before both Houses of Parliament; and for the sake of one uniform system it is also expedient that provisions should be made in respect to the time for holding such general annual meetings: it is enacted, that the several and respective clerks of the said trustees or commissioners holding such annual meetings respectively as aforesaid, shall within 30 days from the passing of this act transmit to one of his Majesty's principal secretaries of state for the time being, copies of all such annual statements so already sent by them respectively to the clerks of the peace as aforesaid, and shall also transmit to one of his Majesty's principal secretaries of state for the time being copies of all such general annual statements for any future year or years so directed to be transmitted to the clerks of the peace as aforesaid, within 30 days after the same shall have been so approved and signed as aforesaid; and if any such clerk to the said trustees or commissioners shall refuse or neglect to transmit such copies of such annual statements within the time hereinbefore prescribed for that purpose, then and in every such case every such clerk so offending shall for every such offence forfeit any sum not exceeding 10*l*. nor less than 5*l*. at the discretion of any justice or justices of the peace before whom complaint of such offence shall be made.

Sect. 3. The annual statement of the debts, revenues, and expenditure of every turnpike trust so as aforesaid required by the said 3 Geo. 4, and also by this act, to be made out by the clerk and surveyor to the trustees or commissioners holding such general annual meeting, and submitted to the trustees or commissioners then assembled, shall be made out of the debts, revenues, and expenditures received or incurred on account of the trust for which the meeting shall be held between the 1st day of January and the 31st day of December of the year preceding the year in which such meeting shall be so held, and according to such schedule.

5. Trustees.

3 & 4 W. 4, c. 80.

Clerk of trustees to transmit copies of all past annual statements of debts, &c., under 3 Geo. 4, c. 126, to secretary of state within a certain time.

Regulating time for making out annual statement of debts, &c.

5. Trustees.

3 & 4 W. 4, c. 80.
Clerks to prepare
estimates for an-
nual meetings.

Secretary of State
to cause abstracts
of annual state-
ments to be laid
before parliament,

and for that pur-
pose to summon
any clerks, sur-
veyors, &c., be-
fore him, and in-
quire into state of
roads and method
of maintaining
them.

Clerks to trustees
to send copies of
resolutions of
trustees as to con-
tinuation or alter-
ation of turnpike
acts, &c., to secre-
tary of state.

Sect. 4. The several and respective clerks to the said trustees or commissioners shall cause to be prepared and laid before such general annual meetings of the trustees and commissioners respectively, estimates, made out in the form contained in the schedule (B) (a) to this act annexed, of the probable expenditure of their respective trusts for the current year, from the 1st day of January preceding such meeting to the 31st day of December following; and if any such clerk shall refuse or neglect to prepare and lay before such general annual meeting such estimate as aforesaid, every such clerk so offending shall for every such offence forfeit any sum not exceeding 10*l.* nor less than 5*l.*, at the discretion of any justice or justices of the peace before whom complaint of such offence shall be made.

Sect. 5. Such secretary of state for the time being shall yearly and every year cause such annual statements so transmitted to him to be revised and abstracted, and shall cause such abstracts to be laid before both Houses of Parliament, together with any observations he may think proper to make with respect to the state, condition, and repair of the roads or any of them, or with respect to the debts, revenues, expenditure, and management of any of such turnpike trusts.

Sect. 6. To enable such secretary of state for the time being to elucidate such annual statements, and to make such abstract, and prepare such report and observations for both Houses of Parliament, it shall be lawful for such secretary of state for the time being to inquire into the state of the several turnpike trusts whose annual statements shall be so as aforesaid transmitted, and ascertain the amount of the annual income and expenditure of such several trusts, and also to inquire into the method in which the roads under the charge of such trusts are maintained and repaired; and for the purposes aforesaid it shall be lawful for such secretary of state for the time being to summon before him any surveyors, treasurers, clerks, or other officers employed by the trustees or commissioners in respect of the said roads; and the said surveyors, treasurers, clerks, and other officers shall, if required, produce all books of account, plans, maps, papers, documents, and writings in their possession respectively, and shall permit any person appointed by such secretary of state for the time being to inspect, examine, and take copies or extracts from the same or any or either of them; and if any such surveyor, treasurer, clerk, or other officer shall refuse or neglect to attend any such summons, or refuse or neglect to give a full and satisfactory answer to any question which he shall be by such secretary of state for the time being required to answer, or shall refuse or neglect to produce any book of account, plan, map, paper, document, or writing in his possession relating to the road as to which he shall be employed, every person so offending shall for every such offence forfeit any sum not exceeding 20*l.* nor less than 5*l.*, at the discretion of any justice or justices of the peace before whom complaint of such offence shall be made.

Sect. 7. When and so soon as the trustees of any turnpike road shall have entered into a resolution to apply to Parliament for the continuation of the term and powers of the act under which such turnpike road is regulated, or for the alteration or enlargement of any of those powers, or for an increase of the tolls to be levied on such turnpike road, the clerk of the said trustees is hereby required immediately to transmit a copy of such resolution to one of his Majesty's principal secretaries of state for the time being, together with a copy of any special clauses which the trustees may wish to be inserted in

any new act respecting such turnpike road, and also a statement of the increased tolls intended to be levied thereon.

Sect. 8. The penalties hereby imposed shall be recovered and applied in the same manner as penalties imposed by the 3 Geo. 4, c. 126, and the several clauses and provisions therein contained respecting the recovery and application of penalties shall be in force for that purpose as if the same were herein specially re-enacted and contained. (See *post*, p. 1278.)

5. Trustees.

3 & 4 W. 4, c. 80.
Penalties how to
be recovered.

9. SINKING FUND TO BE PROVIDED FOR PAYMENT OF DEBTS.

By 12 & 13 Vict. c. 87, s. 3, it is enacted that in every case in which the trustees or commissioners of any turnpike road shall hereafter borrow, charge, or secure any sum or sums of money on the credit of the tolls arising on such road, such trustees or commissioners shall, out of the tolls of such road, and in priority to all other payments thereout, except the interest on any such monies as aforesaid, and on any other monies remaining owing on the security of the said tolls, set apart a sum of 5*l.* per centum per annum on the amount of money so borrowed, charged, or secured; and when and so often as the sums so set apart as aforesaid shall amount to the sum of 200*l.*, the trustees or commissioners of the road out of the tolls of which such sum has arisen shall, at any general annual or other meeting of such trustees or commissioners, apply such sum in the payment of a proportionate part of the monies borrowed, charged, or secured as aforesaid, and then remaining unpaid, to the creditors on the tolls of such road, and shall, 28 days at least before such general annual or other meeting, cause notice to be given of such meeting, and of the purposes thereof, so far as the same relate to the application of the said sum, in some newspaper usually circulated in the county or counties in which such road is situate; and at such meeting such trustees or commissioners shall apply such sum, or a portion thereof, (as the case may require,) in or towards the discharge of monies owing on the security of the tolls of such road, to the creditor who shall, by proposal in writing transmitted to the clerk of such trustees or commissioners before such meeting, have offered to accept the lowest composition in respect of such monies, and shall apply the surplus (if any) of such sum, after payment to such creditor as aforesaid, or a portion of such sum, (as the case may require,) in or towards the discharge of monies owing on the security of the said tolls, to the creditor who by proposal as aforesaid shall have offered to accept the next lowest composition in respect of such monies, and so in like manner until the sum shall be exhausted; and if two or more creditors by proposals as aforesaid shall have offered to accept an equal rate of composition, it shall be lawful for such trustees or commissioners to determine by lot the preference between or amongst such creditors, or to pay such composition rateably between or amongst such creditors, as such trustees or commissioners think fit; and if there be no such proposal as aforesaid, or there be any surplus of the sum after applying the same, so far as may be necessary, in or towards the discharge of the monies to which such proposals as aforesaid relate, such trustees or commissioners may apply the said sum rateably amongst the creditors, or may pay the same to such of them as may be determined by lot, as such trustees or commissioners think fit.

12 & 13 Vict. c. 87.
Sinking fund for
discharge of
money hereafter
borrowed (a).

When fund
amounts to 200*l.*,
it may be applied
to reduce debt.

Sect. 4. That it shall be lawful for a mortgagee in possession of any toll gate or bar set up or erected on any turnpike road to let to farm the tolls of such gate or bar, in like manner as the trustees or commissioners of any turnpike road may let to farm the tolls of the gates on such road, and for that purpose to exercise all the like powers as such trustees or commissioners might exercise for a like purpose; and all contracts and agreements to be made or entered into for the farming or letting the tolls of such road, signed by such

Mortgagee in pos
session may let
tolls.

5. Trustees.

12 & 13 Vict. c. 87.

Clerk to trustees, &c., to transmit statement to secretary of state, where general annual meeting not held.

mortgagee, shall be as good, valid, and effectual as a contract or agreement for farming or letting the tolls of any turnpike road signed by the trustees or commissioners of such road or two or more of them.

Sect. 5 recites 3 & 4 Will. 4, c. 80, and enacts, that where in any year the trustees or commissioners of any turnpike road shall not hold their general annual meeting on or before the 25th day of March, according to the directions of the said act, the clerk to such trustees or commissioners shall make out such statement of the debts, revenues, and expenditure of the trust as should have been submitted to the trustees or commissioners at such general annual meeting in case the same had been holden, and transmit a copy thereof to one of her Majesty's principal secretaries of state, on or before the 24th day of April in such year; and, save as hereinafter provided, every such clerk who shall neglect to make out such annual statement, or to transmit a copy thereof, within the time hereinbefore prescribed for that purpose, shall for every such offence forfeit any sum not exceeding 10*l*. nor less than 5*l*., at the discretion of any justice or justices of the peace before whom complaint of such offence shall be made: provided always, that it shall not be requisite for such clerk to make out such statement or transmit such copy as aforesaid for or in respect of any period during which the tolls of such road are received by any mortgagee, agent, or person other than such trustees or commissioners or their lessees or farmers.

Mortgagees in possession to transmit accounts.

Sect. 6. That every mortgagee, agent, or other person in possession of any toll gate or bar set up or erected on any turnpike road shall, on or before the 25th day of March in every year, make, and transmit to one of her Majesty's principal secretaries of state, an annual statement of the revenue of such road received by such mortgagee, agent, or other person during the year ending the 31st day of December then preceding, and of the expenditure or application thereof, in the form contained in the schedule (A.) to the said act of the fourth year of king William the Fourth annexed, (*ante*, p. 1170,) or as near thereto as circumstances will admit; and every mortgagee, agent, or other person in possession as aforesaid who shall neglect to make out and transmit such annual statement within the time hereinbefore prescribed for that purpose shall for every such offence forfeit any sum not exceeding 10*l*. nor less than 5*l*., at the discretion of any justice or justices of the peace before whom complaint of such offence shall be made.

Penalties how to be recovered.

Sect. 7. That the penalties hereby imposed shall be recovered and applied in the same manner as penalties imposed by 3 Geo. 4, c. 126.

3 Geo. 4, c. 126.

13 & 14 Vict. c. 79. As to extension of act.

Provision in 12 & 13 Vict. c. 87, for forming a sinking fund extended to debts contracted before passing of said act.

The 13 & 14 Vict. c. 79, s. 4, reciting 12 & 13 Vict. c. 87, s. 3, enacts, that where the trustees or commissioners of any turnpike road had before the passing of the said act borrowed, charged or secured any sum or sums of money on the credit of the tolls arising on such road, and any such money shall remain unpaid and unsatisfied at the time of the passing of this act, such trustees or commissioners shall, out of the tolls of such road, after payment thereof of the interest on any monies owing on the security of the said tolls, and such sums as may be required to be set apart under the said recited enactment, and all other annual liabilities (if any) of their trust, and the necessary expenses of the repairs of such road, and of the salaries of their officers, and all other necessary expenses of their trust, set apart a sum of 5*l*. per centum per annum on the amount of principal money so borrowed, charged or secured before the passing of the said act, and remaining unpaid and unsatisfied as aforesaid, or such lesser sum as may from time to time remain after such payment as aforesaid; and when and so often as the sums so set apart shall amount to the sum of 200*l*. the trustees or commissioners of the road out of the tolls of which such sum has arisen shall apply such sum in or towards payment of the monies so borrowed,

charged or secured as aforesaid, and then remaining unpaid, in manner provided by the said act with respect to the application of money arising from the sums set apart as therein mentioned, in or towards the discharge of monies borrowed, charged or secured, after the passing of such act: provided always, that it shall be lawful for one of her Majesty's principal secretaries of state, if upon the application of the trustees or commissioners of any turnpike road he see fit so to do, by order in writing under his hand, to authorise such trustees or commissioners not to set apart any sum as hereinbefore required, or to set apart a less sum per centum per annum than the sum hereinbefore mentioned, and it shall be lawful for such secretary of state from time to time to vary or revoke any such authority, and such order shall be binding on such trustees or commissioners: provided also, that where provision is made under any local act for forming a fund for the discharge of the monies borrowed, charged or secured on the tolls of any turnpike road, this enactment shall not extend to the trustees or commissioners of such road.

Sect. 5. That where any mortgage of the tolls of any turnpike road shall be made under the powers of any act passed or to be passed in or after the present session of parliament (other than an act continuing the term of any existing act), no holder of such mortgage shall be entitled to enter into possession of all or any of the toll-gates, bars, chains, toll-houses or buildings upon such road in case and so long as the interest on the mortgage debt thereby secured up to the last half-yearly or other periodical day on which such interest is payable be paid within one month after such day as aforesaid, or within one month after the same is demanded (which shall last happen), and where any mortgagee in possession as aforesaid has been fully paid all interest up to the last half-yearly or other such periodical day as aforesaid, together with any costs he may be entitled to retain out of the tolls of the road, he shall, within twenty-one days after such payment, render to the trustees or commissioners of such road on account of his receipts as such mortgagee in possession and of the application thereof, and shall pay the balance (if any) in his hand to the treasurer of such road; and shall deliver possession of all toll gates, bars, chains, toll houses and buildings of which he may have been in possession to the said trustees or commissioners or to some person appointed by them, and where no half-yearly or other periodical day is fixed by such mortgage or otherwise for the payment of interest, such interest shall for the purposes of this provision be deemed to be payable on the first day of May and the first day of November in every year.

And by 14 & 15 Vict. c. 38, s. 1, it is enacted, that where the revenues of any turnpike road in England applicable to the payment of the interest upon the principal money for the time being charged or secured on the tolls or revenues of such road are insufficient (a) for the payment in full of such interest, it shall be lawful for the trustees or commissioners of such road, at any general annual or other meeting, notice being given of such meeting 21 days at the least before holding the same, and of the purpose thereof (so far as the same relates to the powers of this act), in some newspaper usually circulated in the county or counties in which such road is situate, to resolve that in case such consents as hereinafter mentioned of the mortgagees be obtained, an application be made to one of her Majesty's principal secretaries of state for a provisional order to reduce the rate of interest on the mortgage debts charged or secured on the tolls or revenues of such road, to such amount as may be resolved on at such meeting, and for extin-

5. Trustees.

13 & 14 Vict. c. 79.

Secretary of state may authorise trustees not to set apart a sinking fund.

Enactment not to interfere with sinking funds under local acts.

Mortgagee under acts of the present and future session not to enter into possession while interest is punctually paid.

14 & 15 Vict. c. 38.

Trustees of insolvent turnpike trusts, with consent of two-thirds in value of the creditors, may apply for a provisional order for reduction of rate of interest, or extinguishment of arrears.

(a) By the 23 & 24 Vict. c. 73, s. 3, and 24 & 25 Vict. c. 46, s. 2, the provisions of this act are extended to the case of any turnpike road in Eng-

land, the act in relation to which is continued by the Annual Turnpike Acts Continuance Act.

5. Trustees.

14 & 15 ict. c. 58.

guishing in whole or in part the arrears of the interest on such debts, or for either of such purposes; and where any such resolution as aforesaid is made, such trustees or commissioners shall cause notice to be given, by advertisement or otherwise, of such resolution, with such information in relation to the matter of the proposed application, and the consents required by this act, as such trustees or commissioners may think fit; and in case it appear to such trustees or commissioners at any general annual or other meeting that the persons entitled to two-thirds of the money charged or secured on the tolls or revenues of such road, and remaining unpaid, have signified in writing under their hands their consent to the proposed application, it shall be lawful for such trustees or commissioners to make an application accordingly to one of her Majesty's principal secretaries of state for a provisional order for such reduction as aforesaid of the rate of interest on the said debts, and for extinguishing in whole or in part the arrears of interest thereon, or for either of such purposes; and such application shall be signed by three or more of such trustees or commissioners, who shall therein certify that the consents required by this act to such application have been given.

Power to executors, &c. to consent.

Sect. 2. All executors, administrators, guardians, trustees, and all committees of the estates of idiots and lunatics, who, as such, are for the time being entitled to any money charged or secured on the tolls or revenues of any such road, may consent to any such application as aforesaid, as fully as if they respectively were so entitled in their own right, discharged of all trusts in respect thereof, and all executors, administrators, guardians, trustees and committees so consenting are hereby severally indemnified for so doing.

Secretary of state may make a provisional order in pursuance of the application; which order to be binding if confirmed by parliament.

Sect. 3. It shall be lawful for such secretary of state, if he think fit, after receipt of any such application as aforesaid, to make a provisional order under his hand in pursuance of such application; and such secretary of state shall cause such provisional order to be published in such manner as he may think fit; and in case it be enacted by any act of parliament that such provisional order shall be confirmed and be absolute, such provisional order shall be as binding and of the like force and effect as if the provisions thereof had been expressly enacted by parliament, and every such act shall be deemed a public general act.

By 16 & 17 Vict. c. 135, s. 3, the trustees may apply the sinking fund in paying debts before it amounts to 200%, or may postpone its application until it amounts to a larger sum, with the consent of the secretary of state; by s. 4 they may apply the surplus in paying debts, as provided for by the 12 & 13 Vict. c. 87, and 13 & 14 Vict. c. 79.

17 & 18 Vict. s. 58.
Power to executors, &c., to consent.

By 17 & 18 Vict. c. 58, s. 4, all executors, administrators, guardians, trustees, and all committees of the estates of idiots and lunatics, who as such are for the time being entitled to any money charged or secured on the tolls of any turnpike road, may offer to accept and may accept under this act such composition in respect of such money or any part thereof as they in their discretion may deem expedient, as if they respectively were so entitled in their own right, discharged of all trusts in respect thereof, and all executors, administrators, guardians, trustees, and committees so consenting are hereby severally indemnified for so doing.

Tolls not to be charged without consent of secretary of state.

Sect. 5. It shall not be lawful for the trustees or commissioners of any turnpike road to borrow any money on the credit of the tolls of such road, or to make any mortgage, charge, or security of or upon such tolls, without the previous consent in writing of one of her Majesty's principal secretaries of state: Provided always, that this enactment shall not be applicable where power is given by any local act to borrow a limited sum for a specific object on security of such tolls, nor shall it prevent the execution of mortgages which may be given in lieu of mortgages lost or cancelled or otherwise, for securing or further securing money already charged on the tolls of any turnpike road.

10. TO PAY BALANCE ON EXPIRATION OF TRUST TO PARISHES.

30 & 31 Vict. c. 121, s. 3. The trustees or commissioners of a turnpike road which shall hereafter become an ordinary highway shall, as soon as may be after the expiration of their trust, distribute the balance of any monies remaining in their hands amongst the parishes upon which will fall the liability to repair the roads of such trust in proportion to the mileage of such roads in each parish, or, if such road shall be situated in any highway district or highway districts, then the trustees shall pay over such balance to the treasurer or treasurers of such highway district or highway districts in proportion to the mileage of such road in each such highway district, to be distributed in manner aforesaid.

5. Trustees.

30 & 31 Vict. c. 121.
On expiration of trust balance to be paid to parishes.

11. TRUSTEES, PERSONAL LIABILITY OF.

By 7 & 8 Geo. 4, c. 24, s. 2, every trustee who shall order or direct the expenditure of any money for or towards the making repairing, or altering any road not comprehended within the act, in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorised by such act, or by the said recited acts, [3 Geo. 4, c. 126 : 4 Geo. 4, c. 95], such trustee shall be personally liable to the trust for the repayment of the money so expended, at the suit of any person or any one trustee, or of the clerk to such trustees, on behalf of such trust; and that all the costs and charges of such suit, over and above any costs and charges recovered from the defendant in such suit, shall be paid and borne by such trust.

7 & 8 Geo. 4, c. 24.
Trustees personally liable for money expended on roads not in trust.

Sect. 3. No trustee shall be personally subject or liable to be charged (except as next hereinbefore mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road, nor shall execution issue against the goods and chattels of any trustee by reason of his having acted as such trustee, or having signed or authorised or directed any contract or security to be entered into relating to any such road, unless, in such contract or security, such trustee shall have in express words rendered himself so personally liable.

No trustee to be personally liable as such.

By 4 Geo. 4, c. 95, s. 61, the trustees or commissioners for making or maintaining any turnpike road, shall not be personally subject or liable to be charged with the payment of any sum or sums of money, by reason of their having signed or executed any mortgage, or assignment by way of mortgage, or other security to be made by virtue or in pursuance of any act for making or maintaining any turnpike road: Provided also, that in case any action, suit, or prosecution, shall be brought or commenced against any such trustee or commissioner, for any thing done by virtue or in pursuance of the said recited act [3 Geo. 4, c. 126], or this act, or any such act for making or maintaining any turnpike road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the tolls arising on the turnpike road, for which such trustee or commissioner shall act. (See also p. 1257.)

4 Geo. 4, c. 95.
Trustees not personally liable for mortgages.

Costs of proceedings against, to be paid out of tolls, &c.

As to the recovery from trustees of money for compensation or satisfaction for materials, damage, &c., see the 4 Geo. 4, c. 95, s. 71, *post*, p. 1215.

Materials.

Decisions as to Personal Liability of Trustees for Contracts.—Without the above enactments the trustees would have been personally liable like other individuals who contract. (See *Horsley v. Bell*, *Ambl.* 769.)

Decisions as to their personal liability for contracts.

The chairman of the trustees of a turnpike road signed a resolution that the plaintiff should be requested to make a temporary advance of 2,000*l.* to the trustees. The plaintiff advanced the money, but received no security by mortgage of the tolls, as prescribed by 3 Geo. 4, c. 126,

5. *Trustees.*
7 & 8 Geo. 4, c. 24.

s. 81, *post*, 1253. It was held that the chairman (the defendant) was not exempted from personal responsibility by 7 & 8 Geo. 4, c. 2, s. 3. For the meaning of that enactment, coupled with the statute of 4 Geo. 4, c. 95, s. 61, (*supra*), is, that trustees shall be protected only where they have pursued the form of security prescribed by the statutes. (*Parrott v. Eyre*, 10 Bing. 283.)

In the following case the trustees were held to have made themselves liable. Certain of the trustees under an act of Parliament for making a road, the fund provided by the act being neither sufficient nor available for the object until the completion of the road, raised money on their personal credit to carry on the work, and afterwards brought an action against the other trustees, who had attended some of the meetings, for payment of an equal proportion of the whole expense of the road, or at least for a proportion of the expense authorised at the meeting or meetings which they had attended: it was held at first by the court of session, that the mere fact of presence at meetings did constitute a *prima facie* ground of personal liability, and that the *onus* lay on the defenders to show, if they could, facts and circumstances exempting them from that personal liability. But on appeal to and a remit by the House of Lords, it was held that the mere fact of presence at meetings did not constitute a *prima facie* ground of personal liability; and that the *onus* lay upon the pursuers, to show acts, beyond mere attendance, done by the defenders, to render them personally liable; and, therefore, the defences of those trustees against whom nothing was alleged and proved, except the mere fact of presence at meetings, were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expense of such contracts as they signed; and thus judgment was affirmed in *Dom. Proc.* And Lord Eldon said—"That when trustees confined themselves to the act of parliament, and the application of the parliamentary funds, they were not personally liable; but that this also rested on strong principle, that, as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors." (*Higgins v. Levingstone and others*, 4 Dowl. P. C. 341.)

(See *Burrell v. Jones*, 3 B. & Ald. 47; *Iveson v. Conington*, 1 B. & C. 160; *Gow's C. N. P.* 117; *Morton v. Herron*, R. & M. C. N. P. 229; *Cane v. Chapman*, 5 A. & E. 647.)

Decisions as to
personal liability
of trustees for
torts.

Decisions as to Personal Liability of Trustees for Torts.—If the trustees, in the performance of any act which they are empowered to do, behave arbitrarily, wantonly, or oppressively, or are even so careless and negligent as to cause a consequential damage, which might well have been avoided; it seems that in such case they will be personally liable to an action for the injury incurred. (See *Jones v. Bird*, 5 B. & Ald. 837; *Moxon v. Leader*, 2 Sir W. Bl. 924; *Humphreys v. Mears*, 1 M. & R. 187.)

In general, however, no action lies against commissioners (or their servants) appointed under an act of Parliament to effectuate its provisions, unless they exceed their jurisdiction, or do not act carefully, and clearly not where the act gives another remedy. (*Governor and Company of Cast Plate Manufacturers v. Meredith*, 4 T. R. 794.)

If a statute enable trustees to do an act and does not give compensation, they are not liable for a consequential injury resulting to an individual from the act done in the pursuance of the statute. Therefore, where trustees under the General Turnpike Act, by improving the course of a public road, had effected a consequential injury to a private individual, whose estate abutted on the road; it was held, that they were not liable to an action, it appearing that they had not

exceeded the authority given by the statute. (*Bolton v. Crowther*, 2 B. & C. 703.)

5. Trustees.

By a turnpike act, trustees were appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. By the same act, it was provided that all actions for any thing done in pursuance of the act should be brought within 6 months after the doing the thing complained of. A drain was cut by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed. An action was brought against one of the trustees only, more than 6 months after the act done, and the first injury sustained, but within 6 months after a subsequent injury accrued—it was held, 1st, that the action, if it could have been supported at all, was well brought against the defendant only; but 2ndly, that the trustees, having acted to the best of their skill, and with the best advice, were not answerable for the damage which had accrued. (*Sutton v. Clarke*, 6 Taunt. 29. And see *Lloyd v. Wigney*, 6 Bing. 489; *post*, 1180.)

The trustees of a public road, who were empowered and required by act of Parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night toll for the purpose of enabling them to light and watch the same, were held not liable in an action upon the case, for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings left on the road side after cleansing the road, without any lights. *Et per Lord Ellenborough*—"If, by omitting to put up lamps where necessary, the trustees are guilty of a breach of public duty, they may be indicted; but to hold, that every trustee of a road is liable in damages for such an accident as this would, I conceive, be going further than any case warrants." (*Harris and Wife v. Baker*, 4 M. & S. 27.)

It seems also, that trustees of a public road, who, in furtherance of the trusts thereof, employ others under them, are not to be considered in the same light as private individuals; and, therefore, are not answerable for their misconduct, (*Id.*; *Duncan v. Finlater*, 6 Cl. & Fin. 894, where it was also held, that the funds raised by the act under which the trustees are acting cannot be charged with compensation for an injury occasioned by such misconduct), unless, perhaps, where they personally interfere in the management of the works; and a slight interference may not suffice. (*Humphreys v. Mears*, 1 M. & R. 187.) And where the trustees of a turnpike road who were employed to make contracts for the cleansing of the road, engaged with a contractor, and the labourers employed by him did the work so negligently as to injure a passenger, the trustees were held not to be liable, since the labourer could not be considered as in their employment. No duty was imposed upon the trustees to see that the labourers did not commit any nuisance. (*Ibid.*)

But although the trustees themselves may not be liable to make compensation for damage occasioned by acts ordered by them to be done, which are within the scope of their authority, if they proceed with sufficient caution; yet it should seem, from *Hall v. Smith*, (2 Bing. 156), that the person who is appointed to execute such acts, is liable for any negligence in their performance, *post*, 1185.

Trustees of a turnpike road are liable for an injury consequent upon the careless and improper manner in which they execute any matter authorised to be done by them, and the 3 Geo. 4, c. 126, s. 147, does not protect them from liability on account of any fresh damage caused by such negligence, provided the action be brought within three months. (*Whitehouse v. Fellowes*, 30 L. J. C. P. 305.)

5. Trustees.

3 Geo. 4, c. 126.

Trustees may sue
and be sued in
name of clerk, &c.

Indemnity to.

For torts.

4 Geo. 4, c. 95.

On contracts.

3 Geo. 4, c. 126.

Evidence.

Decisions as to the
parties to actions,
&c.

12. ACTIONS BY AND AGAINST TRUSTEES.

By 3 Geo. 4, c. 126, s. 74, the trustees and commissioners of every turnpike road may sue and be sued in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike road, by virtue of this or any other act or acts of Parliament, in the name or names of any one of such trustees or commissioners, or their clerk or clerks, shall abate or be discontinued by the death or removal of such trustee, commissioner, clerk, or clerks, or any of them, or by the act of such trustee, commissioner, clerk, or clerks, or any of them, without the consent of the trustees or commissioners; but that any one of such trustees or commissioners, or the clerk or clerks for the time being to the said trustees or commissioners, shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants, (as the case may be,) in every such action or suit: Provided always, that every such trustee, commissioner, clerk or clerks, shall be reimbursed and paid out of the monies belonging to the turnpike road, for which he or they shall act, all such costs, charges, and expenses as he or they shall be put unto, or become chargeable with, or liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants (a).

The 60th section (*ante*, 1163) gives the trustees, &c., power to sue for injuries done to the property thereby vested in them (b).

The 78th section of the 4 Geo. 4, c. 95, relates to suits by trustees on contracts for amending, &c., the roads. (See *post*, 1216.)

By 3 Geo. 4, c. 126, s. 134, in an action by or against a trustee or commissioner, evidence of such trustee or commissioner having acted as such, together with the act of Parliament by which he was appointed, or the order, or a copy of the order, for his appointment or election, in case he was appointed or elected by the trustees or commissioners, shall be sufficient proof of his being a trustee or commissioner. (See the enactment, and others as to witnesses and evidence, *post*, p. 1281, and *Doe v. Baggeley v. Hares*, 4 B. & A. 435.)

A. agreed in writing to pay the rent of certain tolls, which he had hired, "to the treasurer of the commissioners;" it was held, that no action for rent could be maintained in the name of the treasurer. (*Pigott v. Thompson*, 3 B. & P. 147; and see *Hellings v. Pratt*, 6 Jurist, 914.)

A local act directed, that if any person had a cause of action against the trustees, he should sue the treasurer; it was decided that such proceeding was substituted only for such action as might be maintained against the whole body of trustees, and that an action would not lie against him for the act of five trustees, though they formed a quorum. (*Everett v. Cook*, 7 Taunt. 1.) But in another case, where one trustee was sued for an act done in pursuance of an order signed by a competent number of trustees, the action was held to lie. (*Sutton v. Clarke*, 6 Taunt. 29; and see *Boulton v. Crowther*, 2 B. & C. 703; *Cane v. Chapman*, 5 A. & E. 647.)

(a) In *Cobbett v. Wheeler and others*, 3 E. & E. 358, the plaintiff, an executor of a mortgagee of turnpike tolls, brought ejectment to recover the toll gates, making the toll-gate keepers defendants to the writ, one of the trustees obtained leave to defend as landlord; the plaintiff was nonsuited, and the defendants were

held entitled to their costs, but it was doubted whether if the plaintiff had succeeded, the trustee would have been exempted by this section from personal liability to pay the plaintiff's costs.

(b) See *post*, p. 1280, as to limitation of actions against trustees, &c.

A paving act empowered commissioners to sue in the name of their clerk for any sums due from certain persons therein named, or any other person or persons, payable by virtue of that act; and enacted, that if any treasurer, collector, officer, or other person appointed by the commissioners to collect money, should become bankrupt with money of the commissioners in his hands, his assignees should pay the money in full, in preference to all other debts except debts due to the king: it was held, that the commissioners might sue, in the name of their clerk, the assignees of their banker, to recover the amount of their money in his hands at the time of his bankruptcy, though he had received from the commissioners no written appointment as their banker. (*Frost v. Bolland*, 5 B. & C. 611.)

S. Trustees.

The plaintiff, a clerk to the commissioners for putting into execution a local paving act, under which the commissioners were authorised to sue by their clerk, drew up a contract for paving, of which contract the defendant, the contractor, was, by agreement, to pay the expense. The defendant offered to execute the contract, but refused to pay the plaintiff's charges, as unreasonable: the plaintiff refused to allow the contract to be executed until his charges were paid: and it was held that he could not sue as clerk to the commissioners for these charges. (*Curling v. Johnson*, 10 Bing. 89.)

By a memorandum of agreement between the trustees of a turnpike-road and N., the trustees agreed to let, and N. to take the tolls for a year, at a certain rent; and N. as renter of the tolls, and D. as his surety, severally promised the trustees that N. should pay the rent at the appointed times, and perform certain conditions annexed to the agreement:—Held, that the contract was several, and not joint, and that the trustees could not sue the parties jointly for arrears of the rent. (*Lee v. Nixon*, 1 A. & E. 201.)

By the Harwich Paving Act the commissioners "may sue or be sued for or concerning any thing which shall be *done by virtue or in pursuance of the act*, in the name of their clerk," and are empowered to raise money by rates. Any person may advance money to them, *for the purposes of the act*, in purchase of annuities, which shall be payable and paid by the commissioners out of the money arising from the rates. The act prescribes the form of the grant; which purports that, by virtue of the act, five of the commissioners, in consideration of the sum advanced to them by the party, may grant to him an annuity out of the rates to arise by virtue of the act. A declaration, in case, against the clerk stated, that the plaintiff advanced a sum to the commissioners for the purchase of an annuity; whereupon, by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of the advance, granted to the plaintiff an annuity out of the rates; that a quarterly payment of the annuity became due; that the commissioners then held in their hands, out of the rates, money more than enough to satisfy it; whereupon it became their duty to pay it; and that they had not paid it. It did not appear by the pleadings that there were any annuitants besides plaintiff:—Held (amongst other things) that case was maintainable against the clerk for this breach of duty by the commissioners. (*Cane v. Chapman*, 5 A. & E. 647; and see *Miles v. Bough*, 7 Jur. 81—Q. B.)

Decision as to the form of action.

Where the trustees under a road act were sued in the name of their clerk, in pursuance of the 3 Geo. 4, c. 126, s. 74; it was held that the property of the clerk was not liable to be taken in execution to satisfy the judgment. (*Wormwell v. Hailstone*, 6 Bing. 668; and see *Cane v. Chapman*, 5 A. & E. 661, per Coleridge, J.; *Harrison v. Timmins*, 4 M. & W. 510; and *Emery v. Day*, 4 Tyr. 695.) *Et per Tindal, C. J.*, in *Wormwell v. Hailstone*, (*supra*), "it is asked, how are the debt or damages to be recovered in this action, if the clerk is not liable? This act, undoubtedly, makes no direct provision, as do many others of a

Execution cannot issue against clerk.

Mode of obtaining damages recovered in action against clerk.

5. *Trustees.* similar nature, upon this subject; but there can be no doubt that the funds of the trustees may be made answerable for the amount ascertained on the action, in case of a refusal to apply them, either by a mandamus or by a bill in equity." (And see *R. v. St. Katharine's Dock Company*, 4 B. & A. 360.)
- Mandamus. By a statute, (7 Will. 4 and 1 Vict. c. xxx.) a company was established, with power to make calls, and to sue and be sued in the name of their treasurer or any director: an action was brought against the treasurer, and judgment entered up against *the company*, who appeared to have no assets. The court refused to issue a mandamus commanding the company to pay the sum recovered and costs. (*R. v. The Victoria Park Company*, 1 Q. B. 288.)
- In this case the court also refused to issue a mandamus requiring the company to make calls to enable them to satisfy the debt, it appearing that calls sufficient to satisfy the judgment had been made, but not paid; and that the company had not the proper officers for making such calls. Quære, whether, if these circumstances had not appeared, a mandamus would have gone commanding the company to make the calls?
- As to the writ of mandamus in general, see *post*, tit. "*Mandamus.*"

VI. Officers.

Division of subject.

Herein of,—

1. *Officers in general, their Appointment, Removal, Accounts, and Liabilities*, p. 1182.
2. *Treasurer and Clerk*, p. 1185.
3. *Surveyor and Clerk*, p. 1186.
4. *Collectors and Receivers*, p. 1187.

1. OFFICERS, THEIR APPOINTMENT, REMOVAL, ACCOUNTS, AND LIABILITIES.

4 Geo. 4, c. 95.
Appointing officers, &c., in general.

By 4 Geo. 4, c. 95, s. 43, the trustees or commissioners for making or maintaining any turnpike road may, and they are hereby empowered, by writing under their hands, to appoint (a) such collector or collectors of the tolls arising on such road, and clerk or clerks, treasurer or treasurers, surveyor or surveyors of the said road, and such other officers as the said trustees or commissioners shall think necessary; and such collectors, clerks, treasurers, surveyors, and other officers, or any of them, from time to time to remove, and, on removal, death, or resignation of any such collectors, clerks, treasurers, surveyors, or other officers, to appoint others in their stead; and may and are hereby authorised and empowered, out of any of the monies arising on such turnpike road, to allow and pay to the several collectors, clerks, treasurers, surveyors, and other officers, and to such other person or persons as shall be assisting them or any of them, in or about the execution of the act for making or maintaining such road, and the said recited act (3 Geo. 4, c. 126) and this act, such salaries, rewards, and allowances for their attendance, care, labour, and services, as such trustees or commissioners shall deem reasonable.

Removal.

Salaries, &c.

Stamps.

If any salary, fee, or emolument appertains to the appointment, it must be stamped. See the Stamp Act, tit. "*Grant.*" (*R. v. Lew*, 8 B. & C. 655.)

3 Geo. 4, c. 126.
Victuallers not to hold places of profit.

By stat. 3 Geo. 4, c. 126, s. 75, No person shall be capable of holding any place of profit under any trustees or commissioners of any

(a) See form, No. 57, *post*.

turnpike road, who shall sell any wine, ale, spirituous liquors, or provisions by retail.

The above s. 43 must be read with s. 39 of 4 Geo. 4, c. 95, (p. 1167,) which requires certain notices to be given when it is intended to revoke any order of the commissioners. Therefore, where commissioners had discharged a clerk by a resolution made without such notice, a mandamus was granted to restore him, although, at a former meeting, the commissioners had ordered proper notices to be given of a meeting for the purpose of such discharge, and the notices had not been given, nor the meeting held, owing to the misconduct, as was alleged, of the clerk himself. (*Rea v. Wretham and Denbigh Roads (Trustees)*, 5 A. & E. 581.)

By 9 Geo. 4, c. 77, s. 15, the treasurer, if appointed, consistently with the provisions of the said recited acts of the third (c. 126), fourth (c. 95), and the seventh and eighth (c. 24), years of Geo. 4, and each and every clerk, receiver, collector, surveyor, and other officer appointed under, or employed in the execution of any act, for making or maintaining any turnpike road which may have expired or been repealed, shall hold and enjoy such their several and respective offices and employments, until removed therefrom respectively by the trustees for executing any subsequent act for maintaining the same turnpike road, and each and every such treasurer, clerk, receiver, collector, surveyor and other officer, shall have the like powers and authorities for the purpose of any such subsequent act, and shall be subject and liable to the like pains and penalties, and to the like powers of removal, and to the like rules and regulations in all respects whatsoever, as if he or they had been appointed under or by virtue of such subsequent act.

By 4 Geo. 4, c. 95, s. 47, all such officers as shall have been or shall be appointed by any trustees or commissioners of any turnpike road, shall, from time to time, when thereunto required by the trustees or commissioners, deliver to such trustees or commissioners, or to such person or persons as they shall for that purpose appoint, true, exact, and perfect accounts in writing, under their respective hands, of all monies which they and every of them respectively shall have received to that time, by virtue of any act, and how much thereof hath been paid and disbursed, and for what purposes, together with the proper vouchers for such payments, and shall pay all such monies as shall remain in their or any of their hands to the said trustees or commissioners, or to such person or persons as they shall appoint to receive the same, and not otherwise, within such time as such trustees or commissioners shall limit or appoint; and if any such officer or person shall refuse or neglect to produce or deliver up such accounts, and the vouchers relating to the same, or shall refuse or neglect to pay the money due on such account within the time or in manner aforesaid, or if any such officer or person shall refuse or neglect to deliver up to the said trustees or commissioners, or to such person or persons as they shall appoint, within 10 days after being thereunto required by the said trustees or commissioners, all the books, papers, or writings in his custody or power relating to the execution of any such act, then and in every or any of the said cases, it shall be lawful for any 1 justice of the peace for the county, division, or riding in which such road, or any part thereof, shall be situate, upon complaint (a) made to him by or on behalf of the said trustees or commissioners; and such justice is hereby required, by warrant under his hand and seal, to summon (b) such officer or officers, person or persons, to appear before him, and, upon his, her, or their appearing, or not being to be found, to hear and determine the matter of such complaint in a summary way, and

6. Officers.

4 Geo. 4, c. 95.
Removal of
officer.

9 Geo. 4, c. 77.
Officers to hold
their offices after
any act is re-
pealed, unless
removed by trus-
tees.

4 Geo. 4, c. 95.
Officers to account
when required by
trustees.

Proceedings on
neglect of officers
to account.

(a) See form, No. 115, *post*.

(b) See forms, Nos. 62, 114, *post*.

6. *Officers.*

4 Geo. 4, c. 95.

to settle the said account or accounts, if produced; and if upon confession of the officer or officers, person or persons, against whom any such complaint shall be made, or by the oath or oaths of any witness or witnesses (which oath such justice is hereby empowered and required to administer, without fee or reward); or, upon inspection of the said accounts, if produced, it shall appear to such justice that any of the money which shall have been collected or received shall be in the hands of such officer or officers, person or persons, such justice may, and he is hereby authorised and required, on non-payment thereof, by a warrant or warrants (a) under his hand and seal, to cause such money to be levied by distress and sale of the goods and chattels of such officer or officers, person or persons respectively; and if no goods and chattels can be found (b) sufficient to answer and satisfy the said money, and the charges of distraining and selling the same, or if such officer or officers, or other person or persons, shall not appear before the said justice at the time and place by him appointed for that purpose, unless for some sufficient reason, or, if appearing, shall refuse or neglect to give and deliver to such justice an account or accounts of all receipts and payments as aforesaid, or to produce and deliver up to the said justice the several vouchers and receipts relating to such accounts respectively, or the books, accounts, papers, and writings, in his, her, or their custody or power, relating to the execution of any act for making or repairing turnpike roads, or the said recited act (3 Geo. 4, c. 126) or this act; then and in either of the cases aforesaid, such justice may, and he is hereby authorised and required, by a warrant under his hand and seal (c), to commit such officer or officers, or person or persons, to the common gaol or house of correction of the county in which such road shall be situate, there to remain without bail or mainprize, in case he or they shall be committed for non-payment of any money received by him or them, or in his or their hands, until he shall have accounted for and paid the full amount thereof, or compounded with the trustees or commissioners, and paid such composition in such manner as the said trustees or commissioners shall appoint (which composition the said trustees or commissioners are hereby empowered to make); or in case he or they shall be committed for not delivering any account-books, papers, or writings as aforesaid, until he or they shall have delivered up such books, papers, and writings as aforesaid, or made satisfaction in respect thereof to the said trustees or commissioners; provided that no person who shall be so committed for want of sufficient distress, shall be detained in prison by virtue of this act, for a longer space of time than 6 calendar months.

9 Geo. 4, c. 77.
Officers under expired acts, to account with trustees under new act.

By 9 Geo. 4, c. 77, s. 14, all persons who may be, or shall have been employed, or who shall have received any tolls or other money on account of or for the purposes of any act for making or maintaining any turnpike road which may have expired or been repealed, or who may have or shall have had in their custody or possession, any money, books, papers, writings, or other things relating to any such turnpike road, shall account for and pay and deliver over the same and every part thereof to the trustees for executing any subsequent act for maintaining such turnpike road, in like manner and under the like penalties, as the several collectors and other persons receiving any money, by virtue of the said recited acts of the third and fourth years of the reign of his present Majesty, and of any local turnpike act, are, by the said recited acts of the third and fourth years of the reign of his present Majesty, required to pay or account for the same.

(a) See forms, Nos. 63, 117, *post*.(b) See form, No. 118, *post*.(c) See forms, No. 64, 119, *post*.

By 3 Geo. 4, c. 126, s. 136, every constable, headborough, or tithing-man refusing or neglecting to put this act into execution, or to account for and deliver any forfeiture or penalty according to the directions of this act, and every surveyor of any turnpike road, and every toll collector, and all other persons employed or to be employed by any trustees or commissioners appointed or to be appointed for the repairing roads, who do or shall receive salaries or rewards, who shall wilfully neglect, for the space of one week after any offence being to their knowledge committed, to lay such information upon oath before one or more of his Majesty's justices of the peace for the limit wherein such offence was committed, as by this act is directed, shall upon due information (a) made upon oath before one of his Majesty's justices of the peace for the said limit, forfeit for every such neglect the sum of 5*l*.

6. Officers.

3 Geo. 4, c. 126.
Penalty on constables and persons employed with salaries refusing to execute the act, 5*l*.

A mandamus lies to admit a clerk of trustees, or, it seems, any other officer who holds a valuable estate in his office under the general turnpike acts. (*R. v. Trustees of Cheshunt Turnpike Road*, 5 B. & Ad. 438.) Mandamus to admit.

Where no application had been made to the trustees of a local turnpike act, as a body, to appoint a gentleman appearing to be duly elected as their clerk, and there had been consequently no refusal by them as a body, *Wightman, J.*, refused to grant a mandamus commanding them to make such appointment. (*R. v. The Trustees of the Cheadle Highways*, 7 Jur. 373.)

Officers and agents employed by the trustees, when guilty of laches, negligence, or misconduct, are personally liable for the consequences, although the act ordered to be done was in itself lawful, and warranted by the powers vested in the trustees. In *Hall v. Smith*, 2 Bing. 156, the surveyor and contractor employed by certain paying commissioners, were held liable upon an action brought for an injury inflicted through their leaving unguarded during the night a trench, over which the plaintiff fell and broke his leg, though the commissioners were held not liable. (And see *Jones v. Bird*, 5 B. & Ald. 837.) Personal liabilities.

But such officers and agents will not be liable if the injury arose from the unavoidable consequence of an act authorised by statute to be executed. The interests of individuals must give way to the interests of the public. Whenever the legislature think it necessary, they enable the trustees, &c., to award satisfaction for the injuries they may occasion; but, if there be no such provision, the parties are generally without remedy. (*Governor of Cast Plate Manufacturers v. Meredith*, 4 T. R. 794.)

And whenever specific remedies are given by the statute, they must, in general, be pursued. (*Sutton v. Clarke*, 6 Taunt. 35.)

The surveyor of a turnpike road is not personally liable to answer for wages to labourers for their work in the repair of the road, but the commissioners or their treasurer are the proper parties to be sued. (*Pochin v. Pawley*, 1 W. Bl. 670.) But if the contract be entered into personally with such surveyor, and he voluntarily stakes his individual credit, he will render himself personally liable. (See *Mercel v. Wymondsold*, Hardr. 205.)

A clerk of the trustees is not subject to an execution against him personally, on a judgment against him as clerk. (*Ante*, p. 1181.)

2. TREASURER AND CLERK.

Besides the general enactments, *ante*, p. 1182, by 7 & 8 Geo. 4, c. 24, s. 4, it shall not be lawful for any trustees to continue or appoint the person who has been or may be appointed their clerk, in the execution 7 & 8 Geo. 4, c. 24.
Treasurer and clerk not to be the same person.

(a) See form, No. 61, *post*.

6. *Officers.*

7 & 8 Geo. 4, c. 24.

of any act for repairing or maintaining any turnpike road, or the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, the treasurer for the purposes of such act, or to continue or appoint any person who has been or may be appointed treasurer, or the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer, or of his partner, the clerk, for the purposes of such act; and if any person shall accept both the offices of clerk and treasurer for the purposes of such act, or if any person being the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, shall accept the office of treasurer, or shall act as deputy of the treasurer, or in any manner officiate for the treasurer, or being the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer, or of his partner, shall accept the office of clerk in the execution of such act, or shall act as deputy of such clerk, or in any manner officiate for such clerk, or if any such treasurer shall hold any place of profit or trust under the said trustees, other than that of treasurer, every such person so offending shall, for every such offence, forfeit and pay the sum of 100*l.* to any person who shall sue for the same, to be recovered with full costs of suit in any of his Majesty's courts of record at Westminster, by action of debt or on the case, or by bill, suit, or information, wherein no *essoign*, protection, *wager of law*, nor more than one *imparlance* shall be allowed.

3 Geo. 4, c. 126.
Treasurer to give security.

Security may be taken from any other officer.

By 3 Geo. 4, c. 126, s. 76, the trustees and commissioners of every turnpike road shall, and they are hereby required to take sufficient security from every treasurer to be appointed by them for the purposes of any act or acts of Parliament for making, repairing, or maintaining any turnpike road, for the due and faithful execution of his office, before such treasurer shall enter upon his office; and if they shall so think proper, shall and may also take such security from any other officer to be appointed under or by virtue of this or such other act. (See form, No. 53, *post*.)

Bond of treasurer.

Where a statute requires the treasurer to pay over all monies to the trustees when required, such requisition is a condition precedent to the right of the trustees, to sue upon a bond for the performance of duty of the treasurer. (*Davis v. Cary*, 15 Q. B. 418.)

4 Geo. 4, c. 95.

When damages may be levied on goods in hands of treasurer.

As to when damages may be levied on goods in the hands of the treasurer, see 4 Geo. 4, c. 95, s. 71, *post*, p. 1215.

Execution cannot issue against clerk.

In an action against the trustees in the name of their clerk, execution cannot issue against him personally. (*Ante*, p. 1181.)

Books of account.

See *ante*, p. 1168, as to the books of account to be kept by the clerk, and as to their being open to inspection, &c.

Annual statement of debts, &c.

See *ante*, p. 1170, as to the clerk being directed to prepare annual statements of debts, &c., and to transmit them to the secretary of state, &c.

Estimates for annual meetings.

See, also, *ante*, p. 1171, as to the clerk being required to prepare estimates for annual meetings.

Copies of resolutions of trustees as to continuation, &c., of turnpike acts, &c., to be sent to secretary of state.

And see, *ante*, p. 1172, as to his being required to send copies of resolutions of trustees as to continuation or alteration of turnpike acts, &c., to secretary of state.

3. SURVEYOR AND CLERK (a).

Besides the enactments, *ante*, p. 1182, by 4 Geo. 4, c. 95, s. 44, it shall not be lawful for the trustees or commissioners acting under

(a) See form of bond of, No. 58, *post*.

any act for making or maintaining any turnpike road, to continue or appoint the person or persons who has been or may be appointed their clerk or clerks in the execution of such act, or the partner of any such clerks, or the clerk or clerks, or other person or persons in the service or employ of any such clerk or clerks, the surveyor or surveyors for the purposes of such act; or to continue or appoint any person or persons who has been or may be appointed surveyor or surveyors, or the partner or partners of any such surveyor or surveyors, the clerk or clerks to the said trustees or commissioners; and if any person shall accept both the offices of clerk and surveyor for the purposes of such act, or if any person, being the partner of any such clerk or clerks, or the clerk or clerks, or other person or persons in the service or employ of any such clerk or clerks, shall accept the office of surveyor, or being the partner of any such surveyor or surveyors, shall accept the office of clerk in the execution of such act, and if any such surveyor shall hold or accept any place or office of profit or trust under the said trustees, other than that of surveyor, every such person so offending shall, for every such offence, forfeit and pay the sum of 50*l*. to any person who shall sue for the same, to be recovered, with full costs of suit, in any of his Majesty's courts of record at Westminster, by action of debt or on the case, or by bill, suit, or information, wherein no essoign, protection, or wager of law, nor more than one impurance shall be allowed.

By s. 45, if the surveyor of any turnpike road shall have any part, share, or interest in any contract or bargain for work, materials, tools, or other things, to be done or provided upon, for, or on account of any road or bridge, or any part thereof, under his care and management, or shall upon his own account, directly or indirectly, let to hire any team, or sell or dispose of any timber, stone, or other materials, to be used or employed in making or repairing any such road or bridge, he shall forfeit, for every such offence, the sum of 50*l*.

This surveyor is quite distinct from the parish surveyor.

The surveyor is not responsible to labourers for their wages. The treasurer or trustees should be sued; (*Pochin v. Pawley*, 1 *Sir W. Bl.* 670;) unless, by express agreement, he render himself personally liable. (*Hardr.* 205; *ante*, p. 1185.)

As to the duties of the surveyor, see *post*, Sects. ix. and x. As to his liability, see *ante*, 1185.

Where a highway, part of a turnpike road, is out of repair, the surveyor is liable to be summoned, &c., under the 5 & 6 Will. 4, c. 50, s. 94.

4. COLLECTOR AND RECEIVER.

Besides the general enactments, *ante*, 1182, the 4 Geo. 4, c. 95, s. 49, enacts, that upon the death, incapacity, refusal, neglect, or absconding of any collector or receiver of tolls at any turnpike or weighing machine upon any turnpike road, any two or more trustees or commissioners, though not assembled at any meeting, by writing under their respective hands, shall and may nominate and appoint a proper person in his place, to continue until the then next meeting of the trustees or commissioners of such road, in the stead of such collector or receiver as shall so die, become incapable, refuse, neglect, or abscond; which person so nominated and appointed shall have the like power and authority, and be answerable and accountable in the same manner in all respects, as the person who shall die, become incapable, refuse, neglect, or abscond, would have had or been subject to if living; and if any collector or receiver of tolls as aforesaid, who shall be discharged from his office by the said trustees or commissioners, or the wife or widow, or any of the children, family, or representatives of any collector or receiver who shall die, abscond, refuse, or neglect to perform his duty, or be discharged, or any other person having the possession

6. Officers.

4 Geo. 4, c. 95.
Surveyor and clerk not to be the same person.

Surveyor to hold no other place of profit under the trustees.

Surveyor not to be concerned in contracts, or sell materials.

Duties and liabilities.

4 Geo. 4, c. 95.
Trustees may appoint temporary collectors, &c., in certain cases of death, &c.; may recover tolls, though illegally appointed.

Penalty on former collector, &c., neglecting duty, &c.

6. *Officers.*

4 Geo. 4, c. 95.

3 Geo. 4, c. 126.
No person to gain
a settlement by
renting tolls or by
residence in toll-
houses.

Tolls and toll-
houses, and per-
sons in respect of
the same, not
liable to be rated
to poor rates, &c.

4 Geo. 4, c. 95.
A somewhat
similar enactment
in respect of tolls
for overweight.

3 Geo. 4, c. 126.
Collectors per-
mitting carriages
to pass otherwise
than allowed by
the act, and not
prosecuting, to
forfeit not exceed-
ing 5*l*.

Collector guilty of
misconduct.

of any toll-house or buildings or weighing machine erected by virtue of any act for repairing turnpike roads, or the said recited act, shall neglect or refuse to deliver up such possession for the space of three days after demand thereof made, and notice in writing given for that purpose, by any two or more of such trustees or commissioners, or by their clerk or treasurer, then, and in any of the said cases, it shall and may be lawful for any justice of the peace for the county or place where such toll-house or building or weighing machine shall be situate, by warrant under his hand and seal (a), to order any constable or other peace officer for the same county or place, with such assistance as shall be necessary, to enter such house or building or weighing machine in the day-time, and to remove the person who shall be found therein, together with his, her, or their goods, out of the same, and to put the said trustees or commissioners, or any of their officers, in the possession thereof.

By 3 Geo. 4, c. 126, s. 51, no collector, or person renting such tolls, or residing in such toll-house as aforesaid, and no apprentice or servant of any such collector or person, shall thereby gain a settlement in any parish or place whatsoever; and that no tolls to be taken at any gate erected or to be erected by the trustees or commissioners of any turnpike road, nor toll-house erected or to be erected for the purpose of collecting the same, nor any person in respect of such tolls or toll-house, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial levy whatsoever (b).

By 4 Geo. 4, c. 95, s. 31, no collector or receiver of any tolls or penalties for overweight, residing in any house or building erected or used by the trustees of any turnpike road for the residence or accommodation of persons appointed for weighing any waggons or other carriages, and no apprentice or servant of any such collector or receiver, shall thereby gain a settlement in any parish or place; and that no tolls or penalties for overweight to be taken at any house or weighing machine erected or to be erected or adjoining to any turnpike road, nor any person whatsoever in respect of such tolls or penalties, or any house or building as aforesaid, shall be rated or assessed towards the payment of any poor's rates, or any other public or parochial rate or levy whatsoever.

By 3 Geo. 4, c. 126, s. 52, if any collector or other person appointed to collect the tolls on any turnpike road, shall permit or suffer any waggon, wain, cart, or other carriage to be drawn or pass upon any turnpike road within the view or with the knowledge of such collector or toll gatherer, or to pass through any toll gate or bar, with wheels of a less breadth or of a different construction, [or drawn with a greater number of horses than by this act allowed (c)], or without such names and descriptions painted thereon as are hereinafter directed, and shall not, within the space of one week, proceed for the recovery of the forfeiture or penalty hereby inflicted, or shall allow any coach, chariot, waggon, cart, or other carriage, or any passenger, to pass through any toll gate at which such collector or other person shall be stationed, without paying the toll payable, or shall be guilty of any other misconduct in his office, every collector or other person so offending, and being thereof convicted before one justice, shall forfeit, for every such

(a) See form, No. 89, *post*.

(b) See *R. v. Trustees of Great Dover-street Road*, 5 *Ad. & E.* 693, where it was held, that the trustees under a local act were not liable to be rated for land upon which they had made a road, and in respect of which they received tolls. If a mortgagee

bring ejectment and take possession of the toll-houses and tolls, he would come within the direct words of the clause. (*Id.*; *per Coleridge, J.*) See this enactment and case more fully noticed, *post*, tit. "*Poor*."

(c) The words within brackets are repealed by 4 Geo. 4, c. 95, s. 27.

offence, any sum not exceeding 5*l.*, as the justice by and before whom such offender shall be convicted shall judge proper.

By 4 Geo. 4, c. 95, s. 30, every toll collector on every turnpike road shall place, or cause to be placed, on some conspicuous parts of the fronts of the several toll-houses at which they shall be respectively stationed, and so that the same shall appear to public view, their christian and surnames, painted in black on a board with a white ground, each of such letters of such name or names to be at least two inches in length, and of a breadth in proportion (*a*), and that such board shall be and remain at such toll-house during the whole of the time that the person whose name shall be expressed thereon shall be on duty thereat; and if any collector of the said tolls shall not place such board and keep the same there during the time he shall be such collector as aforesaid, or shall demand and take a greater or less toll from any person than he shall be authorised to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners, made in pursuance thereof, or shall demand and take a toll from any person or persons who shall be exempt from the payment thereof, and who shall claim such exemption, or shall refuse to permit or suffer any person or persons to read, or shall in anywise hinder any person or persons from reading the inscriptions on such board, or shall refuse to tell his christian and surname to any person or persons who shall demand the same on being paid the said tolls, or any of them, or shall in answer to such demand give a false name or names, or shall refuse or omit to give to the person paying the toll a ticket denoting the payment of the tolls, and naming and specifying the toll gate at which such ticket has been delivered, and the toll gate or toll gates (if any) freed by such payment, or upon the legal toll being paid or tendered, shall unnecessarily detain or wilfully obstruct, hinder, or prevent any passenger or passengers from passing through any turnpike or toll gate, or shall make use of any scurrilous or abusive language to any trustee or commissioner, traveller, or passenger, then, and in every such case, every such toll collector shall forfeit and pay any sum not exceeding 5*l.* for every such offence. [As to recovery of penalties, see *post*, p. 1278.]

Sect. 50. No person or persons who shall ask and take more toll than he is authorised to take by this act, or any act now in force, or by any act hereafter to be made and passed, shall be prosecuted by indictment for extortion, or otherwise, nor shall any other proceeding be adopted against such person or persons for the offence aforesaid,

6. Officers.

4 Geo. 4, c. 95.
Toll collectors to put up their names;

taking greater or less toll, &c.;

taking toll from person exempt; other offences;

obstructing passengers;

penalty 5*l.*

Toll collectors taking more toll than allowed, to be proceeded against before a justice, and not by indictment (*b*).

(*a*) This section omits the following now repealed clause contained in 3 Geo. 4, c. 126, s. 53: "And every such collector shall place, or cause to be placed, on the front of the toll-house or toll-houses at which such collectors shall be stationed, the board hereinbefore directed to be provided by the trustees or commissioners, containing the usual name of the turnpike gate where the board shall be affixed, and also the list of the tolls payable at such gate, and of the several gates cleared by the payment of toll at the gate where such collector or collectors shall be stationed as aforesaid; and if any collector of the said tolls shall not place such board respectively as aforesaid, and keep the same," &c. &c.

(*b*) It has been held under a former act, that an indictment for extortion for taking toll where the party claimed an exemption from toll, could not be sustained, where it appeared that the ground for such exemption was not expressly specified to the turnpike gate-keeper at the time the toll was demanded by him; although the nature of the exemption was apparent from the substance (manure) with which the cart was loaded. (*R. v. Hamlyn*, 4 Camp. 379.) The above 50th section takes away the proceedings by indictment: but express notice of the exemption must, it should seem, still be given. (See *R. v. Higgins*, 4 C. & P. 247; *ante*, "Extortion.")

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.
Penalties on toll
collector, &c.,
absconding.

other than by prosecuting for the forfeiture and penalty before a justice of the peace, as is herein or by the said recited act (3 Geo. 4, c. 126) directed (a).

By 3 Geo. 4, c. 126, s. 54, in case any toll collector, or person acting as such, shall offend against any of the provisions of this act, whereby any penalty shall be incurred, and shall abscond or absent himself so as not to be found, then it shall and may be lawful for any justice of the peace, before whom any such toll collector or person shall have been convicted of any such offence, in case of such collector or other person absconding after conviction, or in case of his or her absconding previous to conviction, then for any other justice of the peace acting for the county, on an examination of the circumstances, and ascertaining by the examination of witnesses that such offence has been committed by the person absconding, to order and adjudge that the penalty incurred as aforesaid shall be paid by the lessee or farmer of the tolls under whom such collector or other person shall act; all which penalties shall be levied and recovered from such lessee or farmer, and applied in manner hereinafter directed (see *post*, p. 1278).

See further as to penalties, *post*, p. 1278.

Their accounts.

As to their accounts, see *ante*, p. 1183.

VII. Making and diverting, &c., Roads, Footpaths, &c.

Division of subject.

And herein of:—

1. *Powers and Duties of Trustees as to, in general*, p. 1190.
2. *Purchasing, &c., of Lands, &c., for improving Roads*, p. 1194.
3. *Stopping up and Sale of the old Roads*, p. 1203.
4. *The Agreements to subscribe for making, &c., Roads, and of enforcing the Subscriptions*, p. 1205.

1. POWERS AND DUTIES AS TO, IN GENERAL.

9 Geo. 4, c. 77.
Trustees may
shorten, vary, and
alter roads.

By 9 Geo. 4, c. 77, s. 9 (b), it shall be lawful for the trustees of any turnpike road, and they are hereby authorised and empowered (subject to the restrictions in the said recited acts, (3 Geo. 4, c. 126; 4 Geo. 4, c. 95; and 7 & 8 Geo. 4, c. 24), and this act contained), to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads, or any part or parts thereof, upon, in, through, or over any private lands, grounds, or hereditaments, making or tendering (c) satisfaction to the owners thereof, and persons interested (c) therein for the same, or

Through private
lands.

(a) A mere claim of a right to take certain tolls is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. (*Ree v. Hampshire (Justices)*, 3 Dowl. P. C. 47.)

(b) By this act, so much of the 3 Geo. 4, c. 126, "as authorises the trustees of any turnpike road to make, divert, shorten, vary, alter, and improve any such road, shall be, and the same is hereby repealed."

(c) By a turnpike road act, trustees were authorised to enter upon

and take certain lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings," &c., so taken, "for any loss or damage they may sustain thereby;" and it was also provided, that they should not be authorised to take other buildings, &c., without the consent "of the owners or proprietors thereof, or other persons interested therein;"—Held, 1st, that compensation was to be made in the case of premises taken

for any damage they may sustain thereby (a), and also upon, in, over, or through any common or waste lands, without making any satisfaction for such common or waste lands, in such manner as they shall think proper, so that any such road shall not exceed sixty feet in width, together with such footpath, causeways, bridges, arches, banks, culverts, ditches, drains, and fences, on the line of such road as they shall think necessary or expedient, and it shall also be lawful for the trustees, and for their surveyors or surveyor, and workmen, with or without carts or carriages, from time to time to enter upon the lands and grounds, or hereditaments through which, or whereupon such road, footpath, causeways, bridges, arches, banks, culverts, ditches, drains, and fences, is or are intended to be made or pass, and also upon any adjoining lands or grounds, to take out the same in such manner as such trustees shall think necessary or expedient, without being deemed a trespasser or trespassers (b), and without being subject or liable to any fine, penalty, or punishment for entering or continuing upon such lands or premises respectively, for any of the purposes of the act, for making or maintaining any such turnpike road; and if any person shall pull up, remove, or destroy any stakes (c), or other marks used for the purposes aforesaid, every person so offending shall forfeit and pay for every such offence any sum not exceeding 5*l*.

By 3 Geo. 4, c. 126, s. 111, it shall be lawful for the trustees or commissioners to make and keep in repair, or cause to be made and kept in repair, any causeway or causeways for the use of foot passengers in, upon, or on the sides of the turnpike road, in such manner as they shall think proper; and also to make, or cause to be made, a

7. Making and diverting roads, &c.

9 Geo. 4, c. 77.
Through waste lands.

Not exceeding sixty feet in width.
Power to enter on lands.

Without being trespassers.

Penalty for destroying marks of trustees, &c.

3 Geo. 4, c. 126.
Power to make and repair footways.

under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also to the lessees of the same for terms of years; 2ndly, that the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses. (*Lister v. Lobley*, 7 Ad. & E. 124.) *Littledale, J.*, in delivering his judgment in this case, said, "Both here and under the General Turnpike Act, the general principle clearly is, that compensation shall be made for loss or damage to any parties interested." It seems that trustees are not rendered trespassers *ab initio*, by neglecting to make or tender satisfaction. (*S. C. Williams, J.*) See *post*, "*Mandamus*."

(a) Where an act of parliament authorising a company to construct a canal, gave certain commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained; it was held, that a party entitled to an easement over lands so purchased by them, could not maintain trespass for acts done upon those lands, to the prejudice of his easement; but as soon as any damage was actually sustained, he

ought to have claimed compensation under the act. (*Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472.) See, for what damages a tenant is entitled to compensation, *R. v. London and Southampton Railway Company*, 2 P. & D. 243; *R. v. Hungerford Market Company*, 1 P. & D. 492; *R. v. The Liverpool and Manchester Railway Company*, 4 A. & E. 650; *R. v. London Dock Company*, 5 Ad. & E. 163; *R. v. Leeds and Selby Railway*, 3 A. & E. 683, &c. These cases were decided under local railway acts, &c. See *post*, "*Mandamus*."

(b) Under this clause it has been held, that the trustees are authorised to lower hills and raise hollows, and are not liable to an action for consequential injury resulting from an act which they are authorised to do. (*Boulton v. Crowther*, 2 B. & C. 703.) In the same case, *Littledale, J.*, expressed an opinion, that even without this special clause, the trustees could not have been deemed trespassers. See, further, *ante*, p. 1177, as to the liability of trustees in general.

(c) The trustees may maintain trespass for an injury to their stakes, but not trespass *quare clausum fregit*. (*Driver v. Simpson*, 8 Taunt. 614, and *ante*, p. 1163.)

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.

Where road is ruinous, roads may be made through adjoining grounds.

Recompense to be made to owners for damages.

In cases of difference, two justices shall settle it.

Trustees not to make or repair pavements, causeways, &c., in towns, unless specially directed.

4 Geo. 4, c. 95. Trustees not to pull down dwelling-houses, or deviate more than one hundred yards, or take in gardens, &c., without consent.

road through the grounds adjoining to any ruinous or narrow part of any turnpike road (not being the site or ground whereon any house or houses stand, nor being a yard, garden, park, paddock, planted walk or avenue to any house, or any inclosed ground planted and set apart as a nursery for trees), to be made use of by all passengers, cattle, and carriages, as a public highway, whilst the old road is repairing or widening, and till such time as it shall be convenient for passengers and carriages to pass along the same, making such recompense to the owners and occupiers of such private grounds respectively, for the damages they shall or may thereby sustain, as shall be adjudged reasonable by the trustees or commissioners of the road under repair or alteration; and in case of any difference concerning such damages between such owners or occupiers and such trustees or commissioners, that then it shall and may be lawful for any two or more justices of the peace acting in and for the county wherein such grounds shall be situate, on 14 days' notice in writing being given by either party to the other, to settle, adjudge, and finally determine what recompense shall be made to such owners and occupiers, for the damages they shall have sustained as aforesaid. (See 4 Geo. 4, c. 95, s. 71, *post*, p. 1215.)

Sect. 112. Nothing herein contained as to the making or maintaining any causeway or footpath, or any other matter or provision in this act, shall extend or be deemed or construed to extend to authorise or empower any trustees or commissioners of any turnpike road to lay down, continue, repair, or maintain any pavement, or any paved or pitched causeway or footpath, in or upon, or at the side of any turnpike road within any town, village, or hamlet where such turnpike road shall pass through the same, unless provision shall have been or shall be specially made for that purpose in the act or acts of Parliament under which such turnpike road shall be made, maintained or repaired; but in default of such provision, all and every such pavement, paved or pitched causeway or footpath within such town, village, or hamlet, shall be made, repaired, and maintained, by and at the cost of the inhabitants of such town, village, or hamlet, or by such other persons as shall be in anywise liable to make, maintain, and repair the same.

By 4 Geo. 4, c. 95, s. 65, it shall not be lawful for the trustees or commissioners of any turnpike road, in altering or diverting the course of any part of the turnpike road under their care and management, to take or pull down any dwelling-house or other building, or in altering or diverting the course of any part of the turnpike road under their care and management, to deviate over any inclosed lands or grounds more than 100 yards from the line or course of such turnpike road, without the consent (a) in writing of the owner or proprietor, or of the person or persons hereby authorised to act for and on behalf of the owner or proprietor of such dwelling-house or other building, or of such lands or grounds, or to take in or make use of any garden, yard, or paddock, or any park, planted walk or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, or any part thereof respectively, without the like consent of the owner or proprietor thereof, or of the person or persons hereby authorised as aforesaid, first had and obtained; and it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whomsoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them, and for and on behalf of their *cestui que trusts*,

(a) As to the consent, see the cases, *ante*, 1036.

whether females covert, infants, or issue unborn, lunatics, idiots, or other person or persons whomsoever, and to and for all females covert who are or shall be seised of or interested in their own right, and to and for all and every person or persons whomsoever who are or shall be possessed of or interested in any such lands, tenements hereditaments, or premises, or who shall sustain any damage, to give their consent in writing to the said trustees or commissioners, for the taking or pulling down of such dwelling-house or other building, or the making such deviation of more than 100 yards as aforesaid, or the making use of such garden, yard, paddock, park, planted walk, avenue, or other such premises as aforesaid, and to contract with the said trustees or commissioners for the sale thereof, or for the satisfaction to be made for the same, or for such damages as aforesaid, and by conveyance, lease and release, or bargain and sale, to sell and convey unto the said trustees or commissioners all or any such lands, tenements, hereditaments, or premises, or any part thereof, for the purposes aforesaid; and all contracts, sales, and conveyances which shall be so made, shall be good, valid, and effectual, to all intents and purposes, without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts, and interests whatsoever, any law, statute, usage, custom, or other matter to the contrary notwithstanding; and all such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, and all other persons, shall be and are hereby indemnified for what they or any of them shall do by virtue or in pursuance of this act: Provided always, that nothing herein contained shall extend, or be deemed, taken, or construed to extend to revoke, limit, abridge, alter, or vary any powers or authorities contained in any act or acts of Parliament existing and in force at the passing of this act, for making, altering, or diverting any turnpike road or roads, or the course thereof, to be made, altered, or diverted and maintained under the authority of such acts, but the same powers and authorities shall and may be exercised and carried into effect by the trustees or commissioners appointed by such acts, fully and effectually; anything herein contained to the contrary notwithstanding.

7. *Making and diverting roads, &c.*

4 Geo. 4, c. 95.

Proviso as to acts in force at the time of passing the act.

Trustees to fence roads (a).

Sec. 66. In all cases where the trustees or commissioners of any turnpike road shall turn or alter any part or parts of such turnpike road, or make any new road over and through any private grounds, or across any public or private footway, or shall take away any fence for widening or improving any such road, the said trustees or commissioners shall make, or cause to be made and planted, proper quickset hedges, or shall make or build proper fences or walls on both sides of such new made road, or on the side upon which any such fence may be so removed as aforesaid, with sufficient ditches to the same, and sufficient posts and rails, or other fence, on both sides of such quickset hedges, to protect the growth thereof, so as effectually to guard and fence off the lands adjoining any such road from trespass or injury by horses, asses, cattle, sheep, or swine; and also proper gates, stiles, posts, bridges, and arches, where necessary, out of any such road into the lands adjoining, and shall keep such fences so as to be made in good order and repair, for and during the term of five years from the time that such fences shall have been made or set up; unless the owners or proprietors for the time being of any such land or ground shall agree with the trustees or commissioners to keep such fences in repair from an earlier period for such time as aforesaid (b).

(a) See the case of *Winter v. Charter*, 3 Y. & J. 308.

(b) If trustees under an act turn a road through an inclosure, and make

the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special pro-

7. *Making and diverting roads, &c.*

4 Geo. 4. c. 95.

Materials for making roads, how obtained.

Contracts for repairing.

Road must be completed before repayable by the public.

Where the trustees of a turnpike road had formed a new road through private grounds, but had neglected to make proper fences, as required by the above enactment; it was held, that the want of the necessary funds for that purpose was not a sufficient answer to a mandamus commanding them to make the fences. (*Reg. v. Luton Roads (Trustees)*, 1 Q. B., 860.)

See how materials may be obtained for the purpose of making roads, &c., *post*, p. 1211.

As to contracts for repairing roads, see 4 Geo. 4, c. 95, s. 78, *post*, p. 1216.

See *ante*, p. 992, as to the public not being liable to repair a road authorised to be made by an act of Parliament until it is completed.

2. PURCHASING, &C., LANDS, &C., FOR IMPROVING ROADS.

3 Geo. 4, c. 126.
Lands may be purchased for improving the road (a).

Bodies politic, &c., and incapacitated persons empowered to sell.

* *Sic.* The word "in" seems omitted.

Such bodies and persons may convey by deed, &c.

Contracts binding.

By 3 Geo. 4, c. 126, s. 84, it shall be lawful for the trustees or commissioners of any turnpike road to treat, contract, and agree with the owners of, and persons interested in any lands, tenements, hereditaments, and premises, with their appurtenances, which they shall deem necessary to purchase, for the purpose of widening, diverting, altering, and improving such road, for the purchase thereof, and for the loss or damage such owners or persons may otherwise sustain; and it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whomsoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled to reversion, remainder, or expectancy after them, and for and on behalf of their *cestui que trusts*, whether females covert, infants, or issue unborn, lunatics, idiots, or other person or persons whomsoever, and to and for all females covert who are or shall be seised of, or interested in their own right*, and to and for all and every person and persons whomsoever, who are or shall be possessed of, or interested in any such lands, tenements, hereditaments, or premises, or who shall sustain any damage as aforesaid, to contract with the said trustees or commissioners for the sale thereof, or for the satisfaction to be made for the same, or for such damages as aforesaid; and by conveyance, lease and release, or bargain and sale, to sell and convey unto the said trustees or commissioners, all or any such lands, tenements, hereditaments, or premises, or any part thereof, for the purposes aforesaid (b); and all contracts, sales, and conveyances which shall be so made, shall be good, valid, and effectual, to all intents and purposes, without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts, and

vision in the act to that effect. (*R. v. The Commissioners of Llandillo District*, 2 T. R. 232.) In this case it was considered, that what is meant by a road is the surface over which the king's subjects have a right to pass, and that the owners of the land are bound to *repair* the fences on each side, unless otherwise provided by the act.

See also the meaning of the words *road* and *centre of the road*, *ante*, p. 1157.

(a) See as to the principles upon which a court of equity will exercise

jurisdiction over bodies to whom Parliament has given power of making compulsory purchases of lands, *Webb v. Manchester and Leeds Railway Company*, 4 Myl. & Cr. 116.

(b) This clause, directing a conveyance to the trustees, where lands are purchased by them, does not apply where the vendors are persons sui juris, and acting in their own right—and no such conveyance is necessary to give the public a right to the new road, or the vendor a right to the old. (See *Allnutt v. Pott*, 1 B. & Ad. 302.) See form of conveyance, p. 1202.

interests whatsoever, any law, statute, usage, custom, or other matter to the contrary notwithstanding; and all such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, and all other persons, shall be and are hereby indemnified for what they or any of them shall do by virtue or in pursuance of this act.

Sect. 85. If any such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees, committees, executors, administrators, or any other person or persons interested in any such lands, tenements, hereditaments, or premises, or sustaining any damage as aforesaid, upon notice (b) to him, her, or them, given or left in writing at the dwelling-house or dwelling-houses, place or places of abode of such person or persons, or of the principal officer or officers of any such bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, or at the house of the tenant in possession of any such lands, tenements, hereditaments, or premises, shall, for the space of 30 days next after such notice given or left as aforesaid, neglect or refuse to treat, or shall not agree in the premises, or by reason of absence shall be prevented from treating, then and in every such case, the said trustees or commissioners shall cause such damage, value, or recompense to be inquired into and ascertained by a jury of 12 indifferent men of the county, riding, or place wherein such lands, tenements, hereditaments, or premises do lie; and, in order thereto, the said trustees or commissioners are hereby empowered and required, from time to time, as occasion shall require, to summon and call before such jury, and examine upon oath, all and every person and persons whomsoever, who shall be thought necessary and proper to be examined concerning the premises; (which oath the said trustees or commissioners, or any or either of them, are and is hereby empowered to administer); and such trustees or commissioners shall, by ordering a view or otherwise, use all lawful ways and means, as well for their own as for the said jury's information in the premises; and after the said jury shall have inquired of and assessed such damage and recompense (c), they the said trustees or commissioners shall thereupon order (d) the sum or sums of money so assessed by the said jury, to be paid to the said owners or other persons interested, according to the verdict or inquisition of such jury (e); and such verdict or inquisition,

7. Making and diverting roads, &c.

3 Geo. 4, c. 126. Bodies politic, &c. indemnified.

When persons interested (a)

after notice

shall neglect or refuse to treat, &c.;

damage, &c., to be ascertained by a jury.

Power to summon witnesses.

View, &c.

Order of payment of value assessed.

Verdict final.

(a) See a variety of forms applicable to this provision, *post*, Nos. 67 to 76.

(b) This is essential, and must appear to have been duly given on the face of the proceedings. (*R. v. Bagshaw*, 7 T. R. 363; *Rex v. Norwich and Watton Road Trustees*, 5 A. & E. 563. And see *R. v. South Holland Drainage Committee*, 8 A. & E. 429; *R. v. Trustees of Swansea Harbour*, 8 A. & E. 439; *Doe d. Payne v. The Bristol and Exeter Railway Company*, 6 M. & W. 320. See form, *post*, No. 67. And see *Sims v. Commercial Railway Company*, 1 Rail. Cases, 431, where a notice to treat under a railway act was held sufficient, and *infra*, *n.* (e).)

(c) In estimating the damages, *Grose, J.*, observed—"The jury must be taken to give as much as will, besides the value of the land, indemnify

the party for the expense of keeping up the fences between the road and the inclosure." (*R. v. Llandillo Commissioners*, 2 T. R. 233-4.) Where a jury was impaneled to assess the value of, and recompense and satisfaction for, the interests of several parties who had several interests, and found only one general sum; the inquisition was held bad, for not apportioning the value among such parties. (*R. v. Norwich and Watton Roads*, 5 A. & E. 563.)

(d) The making of this order is a ministerial act. It is not a judgment, or in the nature of a judgment. (*R. v. Trustees of Norwich and Watton Roads*, 5 A. & E. 563.)

(e) Upon the inquisition sufficient Form of Inquisition must appear to give it validity. (*R. v. Trustees of Norwich and Watton Roads*, 5 A. & E. 563; *R. v. Bag-*

7. Making and diverting roads, &c.

3 Geo. 4, c. 126.

Trustees empowered to issue warrants, &c., to sheriff, for a jury (b).

Who is to summon same, &c.

and judgment, order, and determination thereon, shall be final, binding, and conclusive, to all intents and purposes, against all parties and persons whomsoever claiming or to claim any estate in possession, reversion, or otherwise, their heirs and successors, as well absent as present, infants, femmes covert, idiots, lunatics, and persons under any other disability whatsoever, bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, as well as all and every person and persons whomsoever (a), and for summoning and returning such juries, the said trustees or commissioners are hereby empowered to issue their warrant or warrants in writing (c) to the sheriff of the county wherein such lands, tenements, hereditaments, or premises do lie, commanding him to impannel, summon, and return an indifferent jury of 24 persons, qualified to serve upon juries, to appear before such trustees or commissioners at such time and place as in such warrant or warrants shall be appointed; and such sheriff, or his deputy, or deputies, is and are hereby required to impannel, sum-

shaw, 7 T. R. 363. Where the inquisition did not set out that the above notices to treat had been given, the judges seemed to be of opinion that it was bad, although it appeared by affidavit that they had in fact been given. (*R. v. Trustees of Norwich and Watton Roads*, *supra*.) *Littledale, J.*, in delivering his judgment in this case, said, "Whether the notice ought to appear on the inquisition is a point on which I desire not to be concluded; but my impression is, that it should appear, not as the finding of the jury, but in the nature of a caption." (See *Doe d. Payne v. The Bristol and Exeter Railway Company*, 6 M. & W. 320; *R. v. South Holland Drainage Committee*, 8 A. & E. 429; *Taylor v. Clemson*, 2 G. & D. 346; and *R. v. Swansea Harbour Trustees*, 8 A. & E. 439.)

(a) The inquisition may be brought up by certiorari; sect. 145 of the above act, which took away certiorari, being repealed by stat. 4 Geo. 4, c. 95, s. 86; and stat. 4 Geo. 4, c. 95, s. 87, taking away certiorari in cases only of proceedings under that statute. (*R. v. Trustees of Norwich and Watton Road*, 5 A. & E. 563.) The inquisition may be removed by certiorari before an order has been made for payment of the money assessed by the jury. (*Ib.*)

(b) If the trustees refuse to issue their warrant for the above purpose, the Court of Queen's Bench will compel them to do so by a writ of mandamus. See the following cases, which have been decided under railway and other local acts containing similar enactments to the above. (*Ex parte Parkes*, 9 Dowl. 614; *R. v. Eastern Counties Railway*, 5 Jur. 365, Q. B.; *R. v. North Midland Railway*

Company, 2 R. Cas. 1; *R. v. Birmingham Canal Company*, 4 Jur. 193; *R. v. Wilts and Berks Canal Company*, 8 Dowl. 623; *R. v. The Northern Union Railway*, 8 Dowl. 329; *R. v. The London and Blackwall Railway Company*, 4 Jur. 859; *R. v. The North Union Railway Company*, 1 R. Cas. 729; *R. v. The Nottingham Old Water-works Company*, 6 A. & E. 355, &c.; *Chalot v. Lord Morpeth*, 15 Q. B. 446; *E. and W. India Dock Companies v. Galke*, 3 Mac. & G. 155.)

A mandamus had been issued, directing the trustees of a turnpike road to hold an inquisition, and ascertain the damage occasioned to a landowner by a new road cut through his land. The jury summoned for that purpose, after being locked up for a whole night, and not being likely to agree on the following morning, were then discharged, without the consent of the party. The court refused to quash a return, stating these facts, without further discussion. (*Re v. Harham Roads (Trustees)*, 4 Jur. 50, Q. B. See "*Mandamus*.")

(c) See a form, *post*, No. 68. When a company empowered by Parliament has given notice to an owner of land to treat for the purchase of a part of it, but the owner and the company cannot agree upon the terms, and the company, therefore, issue a precept to the sheriff to summon a jury to assess the value; the part of the land which is described in the precept as being that of which the jury are to assess the value, must be neither less nor more than that for the purchase of which the owner has already been required by the notice to treat. (*Stone v. Commercial Railway Company*, 4 Myl. & C. 122.)

mon, and return such number of persons accordingly; and out of the persons so impaneled, summoned, and returned, or out of such of them as shall appear upon such summons, the said trustees or commissioners shall and are hereby empowered and required to swear, or cause to be sworn, 12 men, who shall be a jury for the purposes aforesaid; and in default of a sufficient number of jurymen, the said sheriff, or his deputy or deputies, shall return other honest and indifferent men of the standers-by, or that can be speedily procured to attend that service, to the number of 12; and all persons concerned shall have their lawful challenges against the said jurymen when they come to be sworn, but shall not challenge the array; and the said trustees or commissioners acting in the premises, shall have power, from time to time, to impose any reasonable fine or fines upon such sheriff, his deputy or deputies, bailiff or bailiffs, agent or agents, making default in the premises, and on any of the persons that shall be summoned and returned on such jury, and who, without sufficient excuse, shall not appear, or appearing shall refuse to be sworn on the said jury, or being sworn shall refuse to give or shall not give their verdict, or in any other manner wilfully neglect their duty therein, contrary to the true intent and meaning of this act, and on any of the persons who, being required to give evidence before the said jury, shall, without sufficient excuse, refuse or neglect to appear, or appearing shall refuse to be sworn and examined or to give evidence, so that no one fine be more than 10*l.* on any such sheriff, deputy, bailiff, or agent, nor more than 5*l.* on any other person, for one offence.

By 7 & 8 Geo. 4, c. 24, s. 7, if any lands, tenements, or hereditaments, which shall be purchased for the purposes of any act for making or maintaining turnpike roads, shall be in mortgage to any person, then, and in such case, the trustees shall, and they are hereby required to pay, or cause to be paid, to the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, upon application in writing made to the trustees or their clerk, signed by such mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, such sum or sums of money as shall be agreed for, ascertained, and determined, for the purchase of such lands, tenements, or hereditaments, or a competent part thereof; and such sum or sums of money, when so paid, shall be and be deemed to be, in discharge of the principal money, or part thereof, due on such mortgage or mortgages, and acknowledgment of the receipt thereof shall be made by indorsement on the mortgage deed or deeds, signed by such mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, in the presence of one or more credible witness or witnesses; and such indorsement shall be and be deemed to be a full and sufficient discharge to the trustees from the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, and also a full and sufficient discharge to the mortgagor or mortgagors, his, her, or their heirs, executors, administrators or assigns, from the mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, for so much money as shall be expressed in such indorsement.

By 3 Geo. 4, c. 126, s. 86, every sum of money or recompense to be agreed for or assessed as aforesaid, shall be paid out of any monies in the hands of the said trustees or commissioners, or out of the tolls granted by the act for making and repairing such turnpike road, or out of the monies to be borrowed on the credit thereof, to the party or

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.

Challenges.

Fines may be imposed on sheriffs,

persons summoned on jury,

and witnesses making default, &c.

7 & 8 Geo. 4, c. 24. Provision for payment of mortgages on lands purchased.

3 Geo. 4, c. 126. Money assessed for lands, &c., to be paid by trustees, and tendered to parties entitled thereto, or paid into bank (a),

(a) If the company refuse to pay the sum assessed, the Court of Queen's Bench will compel them to do so by a writ of mandamus. (See *R. v. The Nottingham Old Water-works*, 6 A. &

E. 355.) The court will not grant a peremptory mandamus in the first instance; the motion must be for a rule nisi. (*R. v. Dewsbury Turnpike Road (Trustees)*, 4 Jur. 26 B. C.) In the

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.
upon which the
premises shall
vest in trustees,

After new road is
completed, the
old road may be
sold.

* *Sic.*

When old road
leads to place, &c.
which new road
does not, what to
be done.

Purchase-money
to be applied to
purposes of act.

parties, or person or persons respectively entitled thereto, or to their agents, or into the Bank of England (a), in manner by this act directed, (as the case may be); and upon such payment to such parties or persons, or their agents, or into the Bank of England, and after 30 days' notice thereof given to such parties or persons, or to their agents, or left at their respective usual places of abode, or with the tenant or tenants in possession of such lands, tenements, hereditaments, and premises, then such lands, tenements, hereditaments, and premises respectively, shall be vested in such trustees or commissioners, and shall and may be taken and used for the purposes of such act; and such lands, and the site of such lands, tenements, hereditaments, and premises, shall be laid into and made part of the road, in such manner as the said trustees or commissioners shall direct, and shall be repaired and kept in repair by such trustees or commissioners, by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all parties and persons whomsoever shall be divested of all right and title to such lands, tenements, and hereditaments; and after such new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, or * shall or may be stopped up and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land or waste ground, or to some church, mill, village, town or place, lands, or tenements, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper (b) to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals), and shall be vested in, and shall and may be sold and conveyed (c) by the said trustees or commissioners, in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the act for repairing and

first of these cases it was also held, that the company, in showing cause against the rule for a mandamus, were precluded from contending that the injury sustained by the applicant was not within the act under which the compensation was claimed, or that all preliminaries necessary to support a former mandamus, commanding them to issue their warrant for a jury to assess the damages sustained by the applicant, were not fulfilled; that all formal preliminaries, essential to the verdict, must be presumed to have been fulfilled in default of affidavit to the contrary; that the jury having assessed a compensation to the applicant, without noticing the interest of any other person, it was not to be presumed, in the absence of any affidavit, that they had given such compensation for a larger interest than the applicant really had, or had overlooked any other person's interest; that if costs were recoverable at all for the inquisition, &c., they must be levied as prescribed by the act; that no mandamus would lie for the payment,

though application had been made to a justice for a distress warrant, which he had refused; and that a mandamus would not lie for the costs of the former mandamus.

(a) This part of this provision is repealed, and a new one enacted, by 7 & 8 Geo. 4, c. 24, ss. 9, 10, 11, &c. See *post*, p. 1199.

(b) This part of the clause does not take away the power to stop up a road leading to some church, &c.; but authorises the trustees to leave open roads of that description, when, in their discretion, they shall think fit. (*De Beauvoir v. Welch*, 7 B. & C. 266.) It was observed in this case, that the trustees had "even the remarkable power of converting a public into a private way." (See *Winter v. Churton*, 3 Y. & J. 308.)

(c) For the purpose of effecting the sale hereby directed, it seems that the legislature has expressly vested the soil and inheritance in the trustees, otherwise it would not so vest. (See *Davison v. Gill*, 1 East, 69, and observations, *ante*, p. 1163.)

maintaining such turnpike road; and all conveyances, being executed by the said trustees or commissioners, and inrolled in the office of the clerk of the peace for the county, city, or place wherein such road shall be situate, shall be good and effectual in the law to all intents and purposes whatsoever; or it shall be lawful for the said trustees or commissioners, instead of making such sale as aforesaid, to give up to the owners or proprietors of any adjoining lands, tenements, or hereditaments, whose building, land, or ground shall be had or taken for the purposes of this act, any part or parts of the present or old roads, in lieu of, and in exchange for the same, in such way and manner as such trustees or commissioners, and owners or proprietors shall agree upon, and think fit (b).

The 7 & 8 Geo. 4, c. 24, s. 8, repeals so much of the 3 Geo. 4, c. 126, as directs the application of compensation money for lands, &c., purchased for making or maintaining turnpike roads. The sections repealed are the 90th to the 96th inclusive.

By 7 & 8 Geo. 4, c. 24, s. 9, if any money shall be agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used by the trustees, which shall belong to any body politic, corporate or collegiate, corporation aggregate or sole, infant, lunatic, tenant for life or in tail, general or special, feoffee in trust, guardian, committee, trustee, feme covert, or other incapacitated person, such monies shall, if the same amount to the sum of 200*l.*, with all convenient speed, be paid into the Bank of England, in the name and with the privity of the accountant-general of the Court of Exchequer, to be placed to his account *ex parte* the trustees for executing such act, pursuant to the method prescribed by 1 Geo. 4, c. 35, and the general orders of the said court, and without fee or reward; and such money, when so paid in, shall be applied, under the direction and with the approbation of the said court, to be signified by an order to be made upon a petition to be preferred in a summary way by the person who would have been entitled to the rents and profits of the said lands, tenements, or hereditaments, in the purchase of the land-tax or the discharge of any debt or debts, or such other incumbrances, or part thereof, as the said court shall authorise to be paid affecting the same lands, tenements, or hereditaments, or affecting other lands, tenements, or hereditaments, standing settled therewith to the same or the like uses, intents, or purposes: or where such money shall not be so applied, then the same shall be laid out and invested, under the direction and approbation of the said court, in the purchase of other lands, tenements, or hereditaments, which shall be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the lands, tenements, or hereditaments, which shall be so purchased, taken, or used as aforesaid, stood settled or limited, or such of them as at the time of making such conveyance and settlement shall be existing, undetermined, and capable

7. Making and diverting roads, &c.

3 Geo. 4, c. 126.

Conveyances executed by trustees, and enrolled with clerk of peace, to be valid (a).

Instead of selling old road, trustees may give it in exchange to owners of land for new road.

7 & 8 Geo. 4, c. 24. Application of compensation when amounting to 200*l.*, and when the party entitled thereto is under any incapacity.

(a) See *R. v. Leeds and Liverpool Canal Company*, 11 A. & E. 316.

(b) Where trustees under a turnpike act agreed with the plaintiffs to exchange with them a portion of old road for land required to form a new road, pursuant to the above 86th section; the new road having been completed, and an order being made for stopping up the old road as unnecessary, the trustees, by the same order, gave up the portion of old road to the plaintiffs, according to agreement:—it was held, that the public

had acquired a complete right in the new road, and the plaintiffs in the land given in exchange, though no conveyance had been executed on either side. The clause in sect. 84, *ante*, p. 1194, directing a conveyance to the trustees where lands are purchased by them, being held not to apply where the vendors are persons *sui juris* and acting in their own right. (*Allnutt and another v. Pott*, 1 B. & Ad. 302.) See form of such an order, *post*.

7. *Making and diverting roads, &c.*

7 & 8 Geo. 4, c. 24.

Application when under 200l., and above 20l.

When less than 20l.

Payment of money where title not satisfactory, or owner not being found, &c. (a).

of taking effect; and in the mean time, and until such purchase shall be made, the said money shall, by order of the said court, upon application thereto, be invested by the said accountant-general, in his name, in the purchase of three pounds per centum consolidated, or three pounds per centum reduced bank annuities; and in the mean time, and until the said bank annuities shall be ordered by the said court to be sold for the purposes aforesaid, the dividends and annual produce of the said consolidated or reduced bank annuities shall, from time to time, be paid, by order of the said court, to the person who would, for the time being, have been entitled to the rents and profits of the said lands, tenements, or hereditaments so purchased, in case such purchase or settlement were made.

Sect. 10. If any money so agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used, and belonging to any person under any disability or incapacity as aforesaid, shall be less than the sum of 200l., and shall exceed the sum of 20l., then, and in all such cases, the same shall, at the option of the person for the time being entitled to the rents and profits of the lands, tenements, and hereditaments so purchased, taken, or used, or of his guardian or guardians, committee or committees, in case of infancy, idiotcy, or lunacy, to be signified in writing under their respective hands, be paid into the Bank of England, in the name and with the privity of the said accountant-general of the Court of Exchequer, and be placed to his account as aforesaid, in order to be applied in manner hereinbefore directed; or otherwise the same shall be paid, at the like option, to two trustees, to be nominated by the person or persons making such option, and approved of by the trustees taking such lands, tenements, or hereditaments (such nomination and approbation to be signified in writing under the hands of the nominating and approving parties), in order that such principal money, and the dividends and interest arising thereon, may be applied in manner hereinbefore directed, so far as the case may be applicable, without obtaining or being required to obtain the direction or approbation of the said Court of Exchequer.

Sect. 11. Where such money so agreed or awarded to be paid as hereinbefore mentioned shall be less than the sum of 20l., then, and in all such cases, the same shall be applied to the use of the corporation or person who would for the time being have been entitled to the rents and profits of the lands, tenements, or hereditaments so purchased, taken, or used, in such manner as the trustees taking such lands, tenements, or hereditaments shall think fit; or in case of infancy, idiotcy, or lunacy, then to his guardian or guardians, committee or committees, to and for the use and benefit of such person so entitled respectively.

Sect. 12. In case the corporation or person to whom any sum or sums of money shall be awarded, for the purchase of any lands, tenements, or hereditaments, shall refuse to accept the same, or shall not be able to make a good title to the premises to the satisfaction of the trustees, or in case the person to whom such sum or sums of money shall be so awarded cannot be found, or if the person entitled to such lands, tenements, or hereditaments, be not known or discovered, then, and in every such case, it shall be lawful for the said trustees to order the said sum or sums of money to be paid into the Bank of England, in the name and with the privity of the accountant-general of the said Court of Exchequer to be placed to his account, to the credit of the parties interested in the said lands, tenements, or hereditaments (describing them), subject to the order, control, and disposition of the said Court of Exchequer: which said court, on the application of any

(a) See *R. v. The Deptford Pier Company*, 8 A. & E. 910.

person making claim to such sum or sums of money, or any part thereof, by motion or petition, shall, and is hereby empowered, in a summary way of proceeding or otherwise, as to the same court shall seem meet, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the respective estate or estates, title, or interest, of the person making claim thereto, and to make such other order in the premises as to the said court shall seem just and reasonable; and the cashier or cashiers of the Bank of England, who shall receive such sum or sums of money, is and are hereby required to give a receipt or receipts for such sum or sums of money (mentioning and specifying for what and for whose use the same is or are received) to such person as shall pay any sum or sums of money into the bank as aforesaid.

7. *Making and diverting roads, &c.*

7 & 8 Geo. 4, c. 24.

Sect. 13. Where any question shall arise, touching the title of any corporation or person to any money to be paid into the Bank of England, in the name and with the privity of the accountant-general of the Court of Exchequer, in pursuance of this act, for the purchase of any lands, tenements, or hereditaments, or of any estate, right, or interest in any lands, tenements, or hereditaments, or of any bank annuities, to be purchased with any such money, or to the dividends or interest of any such bank annuities, the person who shall have been in possession of such lands, tenements, or hereditaments, at the time of such purchase, and all persons claiming under such person, or under the possession of such person, shall be deemed and taken to be lawfully entitled to such lands, tenements, or hereditaments, according to such possession, until the contrary shall be shown to the satisfaction of the said Court of Exchequer; and the dividends or interest of the bank annuities to be purchased with such money, and also the capital of such bank annuities, shall be paid, applied, and disposed of accordingly, unless it shall be made appear to the said court that such possession was a wrongful possession, and that some other person was lawfully entitled to such lands, tenements, or hereditaments, or to some estate or interest therein.

Persons in possession presumptively entitled.

Sect. 14. Where, by reason of any disability or incapacity of the corporation or person entitled to any lands, tenements, or hereditaments, the purchase-money for the same shall be required to be paid into the said court, and to be applied in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses, it shall be lawful for the said court to order the expenses of all purchases (a) from time to time to be made in pursuance of this act, or so much of such expenses as the said court shall deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the trustees taking any such lands, tenements, or hereditaments, who shall from time to time pay such sums of money for such purposes as the said court shall direct.

The court may order reasonable expenses of purchases to be paid.

By 4 Geo. 4, c. 95, s. 55, all sales and conveyances of any lands, tenements, or hereditaments, to be sold by the trustees or commissioners of any turnpike roads, shall be made at the expense of such trustees or commissioners, and shall be expressed in the following or some similar form of words, as the circumstances of the case may require; *videlicet*,

4 Geo. 4, c. 95. Trustees to pay expense of sales of lands, &c.

(a) It has been held, that, if by a railway act, the company are liable to the expenses of "all purchases" to be made by virtue of the act, this will include the expenses of investing the money in the funds, previously to

its being laid out in lands, to be settled to the like uses as the land purchased by the company. (*Ex parte Bishop of Durham, re Newcastle and Carlisle Railway Act*, 3 Y. & C. 690.)

7. Making and diverting roads, &c. "We, of the trustees or commissioners acting in execution of an act passed [here insert the title of the act appointing them], in consideration of the sum of , to us paid by [name of the purchaser] do hereby grant and release to the said [name of the purchaser] all [describing the premises to be conveyed], and all our right, title, and interest to and in the same, and every part thereof, to hold to the said [name of the purchaser], his heirs, executors, administrators, and assigns, for ever, by virtue, and according to the true intent and meaning of an act passed in the fourth year of the reign of King George the Fourth, intituled, An Act [here set forth the title of this act]. In witness whereof we have hereunto set our hands and seals, this day of ."

4 Geo. 4, c. 95.

Form of conveyances (a).

3 Geo. 4, c. 126.

How expenses of jury and witnesses are to be borne.

By 3 Geo. 4, c. 126, s. 87, in case any jury or juries to be summoned and sworn pursuant to the directions and authority of this act, shall give in and deliver a verdict or assessment for more money as a recompense or satisfaction for the right, interest, or property of any person or persons in any such lands, tenements, hereditaments, or premises, or for any loss or damage to be by him, her, or them sustained, than what shall have been agreed to and offered by such trustees or commissioners before the summoning or returning the said jury or juries, as a recompense or satisfaction for any such right, interest, or property, or for any loss or damage as aforesaid, then, and in such case, the costs and expenses of summoning and maintaining the said jury and witnesses, and all other expenses attending the hearing and determining such difference (b), shall be borne and paid by the treasurer to the trustees or commissioners, out of any money which shall then be in his hands, or out of any monies to be received by virtue of the act for repairing and maintaining such turnpike road, such costs and expenses to be settled and ascertained by some justice of the peace for the county or place wherein the dispute shall have arisen, not interested in the matter in question, who is hereby authorised and empowered to settle and determine the same, and to make an order on the treasurer of the trustees or commissioners liable thereto for the payment thereof (c); but if any such jury or juries so summoned and sworn as aforesaid shall give in and deliver a verdict or assessment for no more or for less money than shall have been

(a) As to when this conveyance is requisite, see *ante*, pp. 1194 and 1199.

(b) A local act empowered certain trustees to purchase messuages, &c., and enacted, that if the owners should not agree with the trustees on the terms, or should neglect or refuse to treat, or by reason of absence or disability should be prevented from treating, the trustees should cause a jury to be summoned by the sheriff to assess compensation, and the sheriff should summon and examine witnesses upon oath; and if the jury should give a verdict for more than the trustees had offered, the costs and expenses of summoning and returning such jury and witnesses, and also of the inquest, to be settled by a justice, were to be borne by the trustees, and recovered by the persons entitled thereto by distress; but if the verdict should not be for more than the sum offered, the trustees were to bear one moiety of the costs and expenses aforesaid, and the other party the other moiety; but where

the parties, from absence or inability, could not treat or agree, such costs and expenses were to be borne by the trustees: and afterwards it was enacted that, in a particular event, messuages, &c., should be sold to certain parties, and that in case of disagreement as to price, the price should be assessed by a jury as before, and the expense of hearing and determining such difference to be borne in like manner:—Held, that an owner of lands to be purchased, in favour of whom a jury awarded more than the sum offered, was entitled to the costs of the inquiry, including witnesses, attendance by attorney at the inquest, conferences, and briefs; and not merely to the expenses of the sheriff and jury, but that the expenses of surveyors, merely as such, could not be included in the costs. (*R. v. The Justices of the City of York*, 1 A. & E. 828; and see *R. v. Gardner*, 6 A. & E. 112; and *R. v. Sheriff of Warwickshire*, 2 R. Cases, 661.)

(c) See 4 Geo. 4, c. 95, s. 71, p. 1215.

agreed to and offered by the trustees or commissioners before the summoning and returning of the said jury or juries, as a recompense and satisfaction for any such right, interest, or property in any such lands, tenements, hereditaments, or premises, or losses or damages as aforesaid, then the costs and expenses of summoning and maintaining the said jury and witnesses, and all other expenses as aforesaid, shall be borne and paid by the person or persons with whom such trustees or commissioners shall have such controversy or dispute; which said costs and expenses having been ascertained and settled by some justice of the peace for the county, riding, or place, wherein the cause of dispute shall arise, not interested in the matter in question (who is hereby required to examine and settle the same), shall and may be deducted out of the money so assessed and adjudged, as so much money advanced to and for the use of such person or persons, and the payment or tender of the remainder of such monies shall be deemed and taken, to all intents and purposes, to be a payment or tender of the whole sum or sums so assessed and adjudged, or otherwise such costs and expenses, in case the same or any part thereof shall exceed such damages, and shall not be paid upon demand, after being so ascertained and settled as aforesaid, may be recovered by the said trustees or commissioners by the ways and means hereinafter provided for the recovery of penalties and forfeitures: Provided always, that in all cases where any person or persons shall, by reason of absence, have been prevented from treating, such costs and expenses shall be borne and paid by the said trustees or commissioners in manner aforesaid. (See ss. 141 and 143, pp. 1278, 1279.)

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.

3. STOPPING UP AND SALE, &C., OF OLD ROADS, &C.

We have already noticed the 3 Geo. 4, c. 126, s. 86, empowering the trustees to sell or exchange the old road, after the new one is completed. (*Ante*, p. 1197.)

By 3 Geo. 4, c. 126, s. 88, when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway (a), and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned with regard to pieces of ground not wanted (b); but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorised to order and lay out if they find it necessary, then, and in such case, the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect; and the money arising from such sale in either of the said cases, shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the tolls arising on such road, as the trustees or commissioners thereof shall think fit; and upon the completion of any contract whereby any part of the old road shall be given in payment for

New road to be deemed a highway.

Old road to be stopped up and sold.

When old road leads to a place, &c., to which the new road does not, what to be done.

Purchase-money of old road, how applied.

On completion of contract, soil vested in purchaser.

(a) By virtue of this provision, a new road, made by the trustees under a local act, becomes a public highway, and will not cease to be so at the expiration of the term for which the local act was made. See *R. v. Win-*

ter, 8 B. & C. 785, as to the public not being liable to repair a road authorised to be made by an act of parliament, until it is completed.

(b) See p. 1204.

7. *Making and diverting roads, &c.*

3 Geo. 4, c. 126.
Mines, &c.

When land not wanted for the road is to be sold, first offer to be made to original or adjoining owners.

What evidence of such offer and refusal.

On dispute as to price, the value to be ascertained by a jury.

Purchase-money how to be applied by trustees.

Form of conveyances.

the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the soil of such old road shall become vested (a) in the purchaser thereof and his heirs; but all mines, minerals, and fossils (b) lying under the same, shall continue the property of the person or persons who would from time to time have been entitled to the same if such old road had continued.

Where upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of B., broke down his fence to make a passage from the new road to the close of A., but did not put up a gate or fence to protect the latter close:—Held, the trustees were wrong-doers, and that B. was responsible for their acts. (*Winter v. Charter*, 3 Y. & J. 308.)

Sect. 89. Where the trustees or commissioners of any turnpike road shall have purchased, or shall be possessed of any piece or pieces of ground not wanted for the purposes of such road, it shall and may be lawful for such trustees or commissioners to sell and dispose of the same: Provided always, that the said trustees or commissioners, before they shall sell and dispose of any such piece or pieces of ground not wanted for the purposes of such turnpike road as aforesaid, to any other person or persons, shall first offer the same to the person or persons of whom the same shall have been purchased, or to the person or persons whose lands shall adjoin thereto, and if such person or persons respectively shall then and thereupon refuse, or shall not agree (except with respect to or on account of the price thereof) to purchase the same respectively, on an affidavit being made and sworn before a master or master extraordinary in the High Court of Chancery, or before one of his Majesty's justices of the peace for the county, liberty, or place where such ground is situate (who are hereby respectively empowered to take such affidavit), by some person or persons no way interested in the said piece or pieces of ground, stating that such offer was made by or on behalf of such trustees or commissioners, and that such offer was then and thereupon refused, or was not agreed to by the person or persons to whom the same was made, such affidavit shall, in all courts whatsoever, be sufficient evidence and proof that such offer was made, and was refused, or not agreed to by the person or persons to whom such offer was made (as the case may be); and in case such person or persons shall be desirous of purchasing such piece or pieces of ground, and he, she, or they and the said trustees or commissioners shall differ or not agree with respect to the price thereof, then the price or prices thereof shall be ascertained by a jury, in manner in this act directed with respect to disputed value of premises to be taken and used in pursuance of this act, and the expense of hearing and determining such difference shall be borne and paid in manner hereinbefore directed with respect to such purchases made by the said trustees, *mutatis mutandis*; and the money to arise by the sale or sales of such pieces or parcels of ground shall be applied by the trustees or commissioners to the purposes of the act for repairing and maintaining such turnpike road, but the purchaser or purchasers thereof shall not be answerable or accountable for any misapplication or non-application of such money; and the conveyances of such piece or pieces of ground shall be made to the purchaser or respective purchasers thereof, and in such manner and form as is hereinbefore directed (c) with respect to the conveyances to be made of the land constituting any part of the roads hereinbefore directed to be sold.

(a) See *Allnutt and another v. Pott*, 1 B. & A. 302.

(b) See the general clause of 7 & 8 Geo. 4, c. 24, s. 18, *ante*, p. 1164, as

to the property in mines, &c.

(c) This is now regulated by the 4 Geo. 4, c. 95, s. 55, p. 1201.

By 4 Geo. 4, c. 95, s. 63, in case the trustees or commissioners for making or maintaining any turnpike road shall become possessed of any tenements or hereditaments which are useless or unnecessary for the purposes of such road, it shall and may be lawful for the said trustees or commissioners to sell and dispose of the same, in such and the same manner as by the said recited act [3 Geo. 4, c. 126] they are authorised and empowered to do, in the cases of any land or ground not wanted for the purposes of such road.

7. *Making and diverting roads, &c.*

4 Geo. 4, c. 95.
Sale of unnecessary tenements.

But this does not apply to toll houses. (See 1244.)

4. AGREEMENTS TO SUBSCRIBE FOR MAKING ROADS, AND HOW SUBSCRIPTIONS ENFORCED, &c.

By 3 Geo. 4, c. 126, s. 82, if any person or persons shall agree to advance any sum or sums of money, to be employed in the making or repairing of any turnpike road or highway intended to be made turnpike, and shall subscribe his, her, or their name or names to any writing, for that purpose, every such person shall be liable to pay every such sum or sums of money so subscribed, according to the purport of such writing; and in default of payment thereof within 21 days after the same shall become payable according to the purport of such writing, and shall be demanded by the person to whom the same is made payable by such writing, or if no person be named therein for that purpose, by the treasurer of such turnpike or intended turnpike road, it shall and may be lawful for every such treasurer or other person to sue for and recover the same in any of his Majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance, shall be allowed.

3 Geo. 4, c. 126.
Agreements to subscribe for making, &c. roads, and how subscriptions enforced.

By 9 Geo. 4, c. 77, s. 6, so much of the said recited act of the third year of the reign of his present Majesty as directs the payment and recovery of any sum or sums of money to be subscribed or agreed to be advanced for the making or maintaining of any turnpike road, shall be and the same is hereby repealed (a).

9 Geo. 4 c. 77

And by 9 Geo. 4, c. 77, s. 7, the several and respective persons who shall subscribe for or agree to advance any money for or towards the making or maintaining any turnpike road or roads, or highway intended to be made turnpike, shall, and they are hereby required to pay the sum or sums of money so subscribed, within such time or times, and in such parts and proportions, as shall be expressed in the writing which shall be subscribed by them or on their behalf, or as the trustees of any such turnpike road shall order and direct: and the same shall be demanded by, and paid to such person or persons as the said trustees shall, by any writing under their hands, authorise to receive the same; and if any person or persons shall neglect or refuse to pay the same, or any part thereof, as aforesaid, it shall be lawful for the said trustees to sue for the same in the name of any one of such trustees or of their treasurer or clerk, and to recover the same, together with full costs of suit, in any of his Majesty's courts of record, by action of debt or on the case, by bill, plaint, suit, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance, shall be allowed; and all such monies shall be vested in the said trustees, and applied as in the act for making or maintaining any such turnpike road or roads shall be mentioned. (See form of agreement, No. 77, *post*.)

The above 6th and 7th sections of the 9 Geo. 4, c. 77, do not repeal the directions in the above 82nd section, and the 148th section (see p. 1284) of the 3 Geo. 4, c. 126, or schedule xiv., annexed to that act,

(a) But only as to payment and recovery of the money. (*Meigh v. Clinton*, 11 A. & E. 418.)

8. Repairs, &c., as to the form of agreement to subscribe money for making and repairing a road. (*Meigh v. Clinton*, 11 *Ad. & E.* 418.)

If the agreement be not such as the acts require, an action for calls cannot be supported by the party's acknowledgment, after the works have been commenced under the act, that he is liable as having signed. (*Id.*)

An instrument in the following form, drawn up at a meeting of trustees, and sent forth for subscription, will not warrant them in making calls upon a party signing it. "At a meeting" &c., "it appearing from the estimates," "that, to effect the object" &c., "namely, the new line from" A. to L., "and the diversion" &c., "an expense of 4600*l.* will be involved," "*it was proposed*, that the necessary applications be made without delay, in order to raise funds to meet the expenses referred to, and the gentlemen undernamed *have proposed* to subscribe such sums for the purpose as are set opposite to their respective names, and which *it is proposed* to secure by way of mortgage on the tolls." (*Id.*)

Assuming this writing to be a proper agreement, quære, whether it would be a defence to an action upon it, that before the act under which the trustees acted was passed, they (with defendants' knowledge) altered the proposed line: and whether such defence ought to be specially pleaded: also, whether it would be a defence, that, after the act passed (and before the above acknowledgment), the diversion was given up. (*Id.*)

3 & 4 Will. 4, c. liv.
Decision under
local act.

A local turnpike act (3 & 4 Will. 4, c. liv.) empowered the trustees to take lands, making compensation, but enacted that the powers so given should cease, if the trustees should not, within three years, agree and pay for the lands required for the purposes of the act, *or so much thereof as shall be deemed necessary or proper*. In an action for calls under this statute, quære, whether it was a good plea, that the trustees did not within three years agree or pay for the lands required for the purposes of the act (specifying the purposes), *or so much of the said lands as the said trustees deemed necessary or proper*. (*Id.*)

VIII. Repairs, &c., of Turnpike Roads.

Herein of:—

1. *Who are liable to such Repairs*, p. 1206.
2. *How Repairs enforced, and herein as to Statute Duty being abolished, and of the Application of a Portion of the Highway Rate towards the Repair of Turnpike Roads*, p. 1208.
3. *Subscriptions for*, p. 1211.
4. *Materials for*, p. 1211.
5. *Erection of Mile Stones, &c.*, p. 1215.
6. *Watering of Roads*, p. 1216.
7. *Contracts for Repairs*, p. 1216.
8. *Fines for not repairing*, p. 1218.

1. WHO LIABLE TO REPAIRS IN GENERAL.

Who liable to repair in general.

The observations already made as to the common-law liability of persons to repair highways will be here applicable. (*Ante*, p. 989, &c.)

See p. 992 as to the public not being liable to repair a road, authorised to be made by an act of Parliament, until it is completed.

Parish not exempt.

Duty of trustees.

The parish is not exempted from the common-law liability of repairing highways made into turnpike roads; yet, a duty is imposed on the trustees to expend the funds in the improvement of them, and

they are liable to pay a portion of a fine imposed upon the parish, upon a judgment against them, for neglect of repair (*ante*, p. 1069, *post*, p. 1218.)

By the 3 Geo. 4, c. 126, s. 88, p. 1203, where an old turnpike road has been diverted, and a new road made, the new road becomes for ever a public highway, and must be repaired and maintained as such.

By the 4 Geo. 4, c. 95, s. 68, after reciting that doubts have arisen and may arise, whether any body politic or corporate, or any particular person or persons, liable to repair, by tenure or otherwise, any old turnpike road, or part of such road widened, altered, diverted, or turned, ought to repair or contribute to the repair of the whole or any part or proportion of the new road set out in lieu of the old turnpike road; for obviating such doubts, and preventing disputes about the same, it is enacted that all and every body politic or corporate, and person and persons (*a*), who was, were, or shall be liable as aforesaid to the repair of any old turnpike road, which has been, since the passing of the said recited act [3 Geo. 4, c. 126], or shall be widened, altered, diverted, or turned, shall respectively be and continue in the same manner liable to the repair of such new road set out in lieu of the old road, or so much thereof as shall be equal to the burthen and expense of repairing such old road, from which he, she, or they shall be exonerated by the widening, altering, diverting, or turning thereof; and if the several parties interested therein cannot agree, the same shall be viewed by 2 justices of the peace of the county where such road shall be, and shall be settled, adjusted, and determined by them, in such manner as they shall think just and reasonable; and from and after such determination of the justices, the body politic or corporate, and person or persons liable to repair such new road as aforesaid, shall bear all charges of presentments, indictments, and prosecutions for not repairing the same; and if it shall be found more convenient to fix a gross sum, or an annual sum, to be paid by any such body politic or corporate, or person or persons, instead of fixing the part or proportion of such new road to be repaired by him, her, or them, the said justices may, with the consent of such person or persons, and also of the trustees or commissioners of the road, obtained at a meeting of such trustees or commissioners, order and direct the same accordingly; and the order and direction of the said justices shall be final and conclusive, and shall continue binding on all bodies politic or corporate, and persons whomsoever.

And by 7 & 8 Geo. 4, c. 24, s. 17, where any part or parts of any turnpike road, or any bridges, arches, drains, or sewers, lying in and upon such road, have been accustomed, or ought to be repaired and maintained by any particular person, body politic or corporate, by reason of the tenure of any lands, tenements, or hereditaments, or otherwise, or by any county, or any parish, or where any composition has been entered into or made in lieu thereof, all and every such part

3 Geo. 4, c. 126.
Where old road diverted, new road becomes a highway.

4 Geo. 4, c. 95.
Persons liable by tenure, &c., to repair old road shall repair the new.

7 & 8 Geo. 4, c. 24
Lands liable to repair of roads, bridges, &c., to continue so.

(*a*) This section applies to parishes. (*R. v. Barton*, 11 *Ad. & E.* 343.) *Et per Lord Denman*,—"I have no doubt upon this question, though I was much struck with Mr. *Byles's* remark, that the parishes appear to have no authorised agent who can agree for them, as well as by his ingenious arguments as to the variance between the language of the corresponding sections in the two statutes, and the difficulty of carrying the provision into effect in the case of

parishes. But the difficulties on the other side are infinitely greater. The legislature cannot have intended to confine the enactment to the case of bodies politic or corporate, or individuals, bound by some special liability to repair in the two parishes respectively. The words of stat. 4 Geo. 4, c. 95, are, no doubt, ill chosen, but we cannot doubt of the intention. The parishes must adapt such means as they have to this intention as well as they can."

8. *Repairs, &c., of roads.* or parts of such road, and all such bridges, arches, drains, and sewers, shall, from time to time, be maintained and kept in repair by such person, body politic and corporate, county, or parish, or such composition shall be paid, in such manner as the same were respectively maintained and kept in repair or paid before the passing the said recited acts, [3 Geo. 4, c. 126; 4 Geo. 4, c. 95,] or of any local act for making or maintaining any turnpike road.

Contracts. As to contracts with persons liable to repair by tenure, &c., p. 1217.

2. HOW REPAIRS ENFORCED, AND HEREIN AS TO STATUTE DUTY BEING ABOLISHED, AND OF THE APPLICATION OF A PORTION OF THE HIGHWAY RATE TOWARDS THE REPAIR OF TURNPIKE ROADS.

How repairs enforced by indictment. The trustees of a turnpike road are not liable to be indicted for the non-repairs of the same. (*R. v. Netherthong*, 2 B. & Ald. 179; *George v. Chambers*, 11 M. & W. 149—per Alderson, B., and ante, p. 1068.) But other parties liable to repair the same may be indicted, in the same way as if it were not a turnpike road. (See ante, p. 1207.)

Mandamus. A mandamus does not lie to compel the repairs of a turnpike road. (*R. v. Oxford and Witney Roads*, 4 P. & D. 154.) See post, "Mandamus."

Jurisdiction of justices to compel repairs. The jurisdiction of justices of the peace as to compelling the repair of highways in general is, by the latter part of the 94th section of the Highway Act, (5 & 6 Will. 4, c. 50,) extended to turnpike roads, when the highway out of repair is part of a turnpike road, p. 1066.

Statute duty abolished. The liability to statute work, however, is now wholly abolished by the 5 & 6 Will. 4, c. 50, which repeals the prior statutes relating to it.

4 & 5 Vict. c. 59. Justices at special sessions for highways, on proof of the deficiency of the funds, &c. of any turnpike trust, may order payment to said trust of a portion of the highway rate. By the 4 & 5 Vict. c. 59 (a), after reciting that by the 5 & 6 Will. 4, c. 50, divers statutes passed in the reign of his late Majesty King George the Third, relating to the performance of statute duty, were repealed, and statute duty was thereby altogether abolished: and that the revenues of some turnpike roads are so unequal to the charge and maintenance of such roads, after paying the interest and principal of the sums due upon mortgage of the tolls thereof, when deprived of the aid heretofore derived from statute duty, that it is necessary that some additional provision be made for such roads, for a limited period: it is enacted, that it shall be lawful for the justices at any special sessions (b) for the highways holden after the passing of this act, upon information exhibited before them by the clerk or treasurer of

(a) See 2 & 3 Vict. c. 81, and 3 & 4 Vict. c. 98,—the acts in force on this subject previous to the passing of the above act, and as to what is a turnpike road within this act. (*Reg. v. Worthing and Lancing Roads*, 23 L. J. M. C. 187.)

(b) That is to say, the special sessions held pursuant to 5 & 6 Will. 4, c. 80, s. 45 (*Reg. v. Morice*, 2 D. & L. 952.)

Notice of appeal against an order requiring a surveyor to pay money out of the highway rates in aid of turnpike funds, must be made within 6 days of the making of the order and not of the service. (*R. v. Derbyshire (Justices of)*, 7 Q. B. 193.) On an appeal against an order for the payment of money to the commissioners of a turnpike trust, to be laid out in

the repairs of the road, the justices making such order are interested parties, and so are magistrates to whom money secured upon the tolls is owing; if, therefore, any one of the magistrates at the sessions is so situated the court will be improperly constituted, and it will be no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party, nor that the interested party withdrew before the decision, if he appear to have joined in the discussion. (*R. v. Hertfordshire (Justices of)*, 6 Q. B. 753.) The time for notice of appeal runs from the making of the order, and not from its service. (*R. v. Derbyshire (Justices of)*, 7 Q. B. 193.) The ratepayers are not "persons liable to pay" the bill of an attorney

any turnpike trust that the funds of the said trust are insufficient (a) for the repairs of the turnpike roads within any parish, notice in writing of such intended information having been previously given on the part of such clerk or treasurer to the parish surveyor 21 days at least before such special sessions, to examine the state of the revenues and debts of such turnpike trusts, and to inquire into the state and condition of the repairs of the roads within the same, and also to ascertain the length of the roads, including turnpike roads, within such parish, and how much of such road is turnpike road, and if after such examination it shall appear to the said justices necessary or expedient, for the purposes of any turnpike road, so to do, then to adjudge and order (b) what portion, if any, of the rate or assessment levied or to be levied by virtue of the said recited act shall be paid by the said parish surveyor, and at what time or times, to the said commissioners or trustees, or to their treasurer or other officers appointed by them on that behalf, such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it was received (c).

8. *Repairs, &c., of roads.*

4 & 5 Vict. c. 59.

employed by a surveyor of highways to conduct an indictment for obstruction of a highway, so as to be entitled to tax it under 6 & 7 Vict. c. 73, although it has been paid out of the highway rates. (*Re Barber*, 14 M. & W. 720.)

(a) In the 2 & 3 Vict. c. 81, s. 1, the words are "wholly insufficient." *Coleridge, J.*, in *R. v. Justices of Berks* (8 Dowl. 727), held, that an order might be made under this section, although all the funds of the turnpike trustees were not exhausted. Where, by a local turnpike act, made before statute duty was abolished, the monies of which the trustees should become possessed were to be applied, first, to the costs of the act; secondly, to complete the road, to erect toll-houses, and repair the road; and thirdly, to pay the interest of money secured upon the tolls; and an order of justices was made, under the 2 & 3 Vict. c. 81, s. 1, for the payment of a portion of the highway rate towards the repair of the road: the court held, that the justices had power to make such order. (*R. v. White*, 4 Q. B. 101.) By a local act, subsequent to the 4 & 5 Vict. c. 59, all the monies coming to the hands of the trustees of a turnpike road were to be applied, first, in defraying the expenses of management, not exceeding 300*l.* in any one year; secondly, in maintaining the road, the amount not to exceed 1600*l.* in any one year; and lastly, in paying off the debt due by the trustees. The annual revenue of the trustees exceeded 1900*l.*, and the expenses of management and maintaining the road fell to short of 300*l.* and 1600*l.* respectively, so that there

was a small surplus applicable to the reduction of the debt; but the trustees wishing to expend a larger sum than this surplus on the latter purpose, applied to justices, under the 4 & 5 Vict. c. 59, s. 1, to make an order upon a highway board to contribute out of the highway rates towards the maintenance of the part of the road in their district, on the ground that the funds of the turnpike trust were not sufficient:—The court held, that the trustees were bound to apply their funds in the order and to the extent provided by their act; and that the 4 & 5 Vict. c. 59, could not override the subsequent local act; and that the trustees were not entitled to the order they asked for. (*Weardale District Board v. Bainbridge*, 1 L. R., Q. B. 396.)

(b) The justices may order a specific sum to be paid; (*R. v. Justices of Berks*, *supra*); *et per Coleridge, J.*,—"They must ascertain the sum to, be paid on the principle of a proportion, and, when they have arrived at it, they may order a specific sum to be paid. If they had ordered a proportion to be paid, it must be calculated afterwards, and would be productive of great difficulty and inconvenience. If their mode of ascertaining the proportion was wrong, an appeal would lie to the quarter sessions, and the highway surveyor would be called upon to rectify it."

(c) See 30 & 31 Vict. c. 121, s. 3 (*ante*, p. 1177), as to payment of balance, on expiration of trust, to parishes upon whom the liability to repair falls.

8. *Repairs, &c.,
of roads.*

This section applies to any turnpike road, whether in existence when the act passed or not. And a turnpike trust is within the act, though the statute authorising the construction of the road contains other objects besides the taking of tolls and the maintenance of the road. (*Sunk Island Turnpike Road v. Patrington*, 31 L. J. M. C. 81.) But justices can only make their order for the repair of a part of the road which has been completed and opened to the public. (*Roberts v. Roberts*, 11 W. R. 35.) It does not enable them to make an order towards the repayment of repairs already executed. (*Brown v. Evans*, 34 L. J. M. C. 101.)

The duties of the turnpike trustees are not altered by this section, nor does it give them any right to apply their funds otherwise than as directed by their local act; and neither under this act nor under 13 & 14 Vict. c. 79, s. 4, p. 1174, can they apply their funds in payment of arrears of interest upon monies secured upon the tolls in priority to the necessary repairs of the road. (*Reg. v. South Shields Roads*, 23 L. J. M. C. 134.)

Application of
highway rates.

A notice to surveyors of highways of an information to be made to justices at special sessions for highways, pursuant to 4 & 5 Vict. c. 59, stating that it was intended to exhibit an information that the funds of the trust (to which the person giving the notice was clerk) are insufficient for the repairs of the turnpike road belonging to the trustees within the hamlet of B., and then and there to apply to such justices to adjudge and order a portion of the rate levied, or to be levied, to be paid by you to the said trustees or their treasurer, was held to give full knowledge of the nature of the application, and that it was not bad for not showing what part of the road was out of repair, nor for what purpose the money was to be paid, or for not showing that the road out of repair was within the sessional division. (*R. v. Preston*, 12 Q. B. 816.) The order of justices, made on the above information, recited, that the surveyors of the highways appeared in pursuance of the notice at the special sessions; and that application was there made to the justices to order a portion of the rates to be levied, by virtue of the statutes in such case made and provided, for the repair of the highways in the hamlet of B., to be paid by the surveyors of the highways of the said hamlet of B. to the trustees or their treasurer, and directed a certain sum to be paid out of the rate which should next be made for the repairs of the highways in B.: it was held, that the order must be taken to refer to the application, and must therefore be considered as made under the statute, and that the order need not expressly adjudicate that the notice was given to the surveyors, or that the information was true; and that it need not specify the particular part of the road to repair which the rate was to be applied, nor set out the state of the revenues of the trust in the hamlet, nor the length of roads there, nor the other particulars into which the justices are directed to inquire by this section; and that the order being made on the surveyors of a hamlet, need not expressly find that the hamlet was one maintaining its own highways; for that might be considered as stated by reasonable intendment. (*Ib.*) The order of special sessions should state that it was made at a special sessions holden in and for the division of the county in which the turnpike road is situated. (*R. v. Morice*, 2 D. & L. 952; *R. v. Derbyshire*, 7 Q. B. 193.)

4 & 5 Vict. c. 59.
Parish surveyor
neglecting to pay
such portion of
rate, it may be
levied by distress.

Sect. 2. If any such parish surveyor shall refuse or neglect to pay over such portion of the said rate or assessment at the time or times and in the manner mentioned in the order of the said justices, the same shall and may be levied upon the goods and chattels of such surveyor, in such manner as penalties and forfeitures are by the said recited act authorised to be levied.

Power of appeal to
justices at quarter
sessions.

Sect. 3. Provided that if any person shall think himself aggrieved by any order, judgment, or determination made, or by any matter or

thing done by any justices of the peace at any such special sessions, in pursuance of this act, such person shall be at liberty to make his complaint thereof by appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county, riding, division, or place wherein the cause of such complaint shall arise, such appellant first giving to such justices 10 days' notice in writing of the grounds of such appeal, within 6 days after such order, judgment, or determination shall be so made or given as aforesaid, who are hereby required, within 48 hours' after the receipt of such notice, to return all proceedings whatever had before them respectively touching the matter of such appeal to the said justices at the general or quarter sessions aforesaid; and that in case of such appeal the said justices at the said quarter sessions, upon due proof of such notice and statement having been given as aforesaid, shall hear and determine such appeal; and the said justices at the said quarter sessions shall have power to award such costs to the parties appealing or appealed against as they the said justices shall think proper, such costs to be levied and recovered in the same manner as any penalties or forfeitures are recoverable under the said recited act; and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form: Provided always, that in case there shall not be time to give such notice as aforesaid before the next sessions to be holden after such order, determination, or judgment, then and in every such case such appeal may be made to the justices at the next following sessions, who shall proceed to determine such appeal in manner aforesaid: Provided always, that it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statements as aforesaid.

8. *Repairs, &c., of roads.*

4 & 5 Vict. c. 59.

Sect. 4. In construing this act the word "parish" shall be taken to mean and include parish, township, tithing, rape, vill, wapentake, division, city, borough, liberty, market town, franchise, hamlet, precinct, chapelry, or other place or district maintaining its own highways.

Interpretation clause.

Sect. 5. This act shall extend only to England.

Extent of act.

This act has been continued to the present time.

3. SUBSCRIPTIONS FOR, AND HOW ENFORCED.

30 & 31 Vict. c. 121, s. 5. Where the repairs of a turnpike road shall be thrown wholly or partly on a parish, any ratepayer of that parish shall, on payment of 1s. to the clerk of the trust, and on any day within 21 days of the general annual meeting of the commissioners of such trust, have access, between the hours of 10 in the morning and 2 in the afternoon, to the accounts of such trust, and shall be empowered to examine and take a copy of the accounts.

30 & 31 Vict. c. 121. Ratepayers to have access to accounts of trust where repairs borne by parish.

See the provisions as to subscriptions for repair of roads, *ante*, p. 1205.

4. MATERIALS FOR MAKING OR REPAIRING ROADS.

By 3 Geo. 4, c. 126, s. 97, It shall be lawful for the surveyor or surveyors to the trustees or commissioners of every turnpike road, and for all such persons as he or they shall appoint, to search for, dig, gather, take, and carry away any materials for making or repairing any turnpike road, out of any common river or brook (not being within 50 yards of any bridge, dam, weir, or jetty), or out of or from any waste or common in any parish, hamlet, or place, in which any part of such road may lie, or any adjoining parish, hamlet, or place, and to haul and carry away any such materials when got over any common or waste lands, without paying anything for such materials, and without being deemed a trespasser or trespassers; the said surveyor or sur-

3 Geo. 4, c. 126. Power to get materials from any river or brook, or from any common or waste lands, without expense,

but filling up the pits, &c.;

8. *Repairs, &c., of roads.*

3 Geo. 4, c. 126.
or from lands of
any person, not
being garden
ground, &c., on
tendering satisfac-
tion for damages;

and materials may
be carried through
any inclosed or
open lands, on ten-
dering damages.

Differences as to
damages may be
settled by two
justices.

veyors, or other person or persons, filling up the pits or quarries, levelling the grounds, or sloping down the banks wherefrom such materials shall be taken, or railing or fencing off such pits or quarries, so that the same shall not be dangerous to any person or cattle, and paying or tendering for the damage done by going through and over any inclosed (a) lands or grounds for or with such materials, and such damages to be ascertained as hereinafter mentioned: and also, that it shall be lawful for the said surveyor or surveyors, and such person or persons as he or they shall appoint, to search for, dig, get, gather, take, and carry away any such materials, in or out of the land of any person or persons, where the same may be had or found, in any parish, hamlet, or place in which any part of such road shall lie or be situate, or in any adjoining parish, hamlet, or place (not being a garden, yard, park, paddock, planted walk or avenue to any house, or any piece of ground planted and set apart as a nursery for trees), making or tendering such satisfaction for such materials and for the damage done to the owners or occupiers of the lands where and from whence the same shall be dug, gathered, and carried away, or over which the same shall be carried, as the said trustees or commissioners shall judge reasonable (b); and also to land on, and carry through or over any inclosed (a) lands or grounds (not being a garden, yard, park, paddock, planted walk, or avenue to a house, or any piece of ground planted and set apart as a nursery for trees), or on, through, or over any open land or common, any stone or other materials for making or repairing any such road, or for building or repairing any present or future toll house or toll houses on or by the sides thereof, from any river, stream, or canal, in any parish, hamlet, or place in which any such road lies, or in any adjoining parish, hamlet, or place, paying or tendering for the damage done in landing on, or going through or over any inclosed (a) lands or grounds, for or with such materials, such sum or sums of money as the said trustees shall judge reasonable; and in case of any difference between such trustees

(a) The words "inclosed lands" in this and the 98th sect. of the above act, were held to mean lands which were actually inclosed and surrounded with fences; and, therefore, where lands, situate on the Downs, were not fenced off, although private property: it was held, that a surveyor appointed by the commissioners might take materials for the repairs of a turnpike road, without the order of the justices mentioned in the 98th section, such lands not being within the meaning of the words "inclosed lands," contained in that section. But it was held to be otherwise where the land was surrounded by a fence, though it were out of repair. (*Tapsell v. Crosskey*, 7 M. & W. 441.) But by the 4 & 5 Vict. c. 51, after reciting the above 98th section, it is enacted, that from and after the passing of this act, all lands and grounds which shall be in the exclusive occupation of one or more persons for agricultural purposes shall be deemed and taken to be inclosed lands or grounds within the meaning of the above act, although the same may not be sepa-

rated from any adjoining lands or grounds of other persons, or from the highway, by any fence or other inclosure. (See this act more fully noticed, p. 1212.)

(b) In *Tapsell v. Crosskey* (*supra*), Parke, B., in answer to an argument of counsel, said, "Mr. Peacock contends, that these words must be limited to the case of materials got on grounds over which they are carried. That depends on the construction of the words *same* and *such*. If those words are taken to refer to the first description of materials, viz. materials for the repair of the turnpike-road (as it seems to me they may), all the difficulty suggested in the argument is got rid of, and the result will be, that materials got from commons and public places may be carried over any other common or open ground, without paying anything for them; but if carried over private lands, whether open or inclosed, compensation must be made by the trustees, the amount to be settled by magistrates in case of dispute."

or commissioners, surveyors, or other persons appointed or employed as aforesaid, and the owners and occupiers of such lands, or any of them, concerning such payments and damages as aforesaid, any 2 or more justices of the peace for the county, riding, or place wherein the place from whence such materials shall have been taken shall be situate, on 10 days' notice thereof being given in writing by either party to the other, shall hear, settle, and determine the matter of such payments and damages, and the costs attending the hearing and determining the same.

Sect. 98. It shall not be lawful for any surveyor, or any other person or persons acting under the authority of this act, to dig, gather, get, take, or carry away any materials for making or repairing any turnpike road, or for other such purpose or purposes as aforesaid, out of or from any inclosed (see *ante*, p. 1212, n.) land or ground, until notice in writing (a), signed by the surveyor, shall have been given to the owner or owners of the premises from which such materials are intended to be taken, or his or her known agent, or to the occupiers of the premises from which such materials are intended to be taken, or left at the house or last or usual place of abode of such owner or occupier, to appear before any 2 or more justices of the peace acting in and for the county, liberty, or place, where the lands from whence such materials are intended to be taken shall lie, to show cause why such materials shall not be had therefrom; and in case such owner, agent, or occupier shall attend pursuant to such notice, but shall not show sufficient cause to the contrary, such justices shall, if they think proper, authorise such surveyor or other person to dig, get, gather, take, and carry away such materials, at such time or times as to such justices shall seem proper; and if such owner, agent, or occupier, shall neglect or refuse to appear by himself or herself, or his or her agent, the said justices shall and may (upon proof on oath of the service of such notice, and which oath they are hereby empowered to administer) make such order therein as they shall think fit, as fully and effectually to all intents and purposes as if such owner or occupier, or his or her agent had attended.

Sect. 100. It shall and may be lawful for the said trustees or commissioners to contract and agree with any person or persons whomsoever, for the purchase or demise from him, her, or them, of, and to hold any land or ground for the purpose of digging stones, gravel, and materials therefrom, for the repair or use of the said road, and at any time afterwards to sell the land or ground so purchased by public auction or tender; provided also, that the entering into any such contract or agreement as last aforesaid, shall not be compulsory against any person or persons unwilling to enter into the same.

By 7 & 8 Geo. 4, c. 24, s. 15, The trustees shall not be required to pay any larger sum as a satisfaction for any materials, raised, taken, or carried away from any lands or grounds for making or repairing any turnpike road, than such sum of money as it shall appear to the 2 justices settling and determining such satisfaction, that such materials might or could have been actually sold for in case the same had not been raised, taken, or carried away by such trustees; and in case the said justices shall be of opinion that the said materials, before they had been so raised, taken, or carried away, could not have been sold or disposed of, then the said justices shall only assess the damage done to the lands or grounds of the owners or occupiers thereof by the raising, gathering, or carrying away the same.

8. *Repairs, &c., of roads.*

3 Geo. 4, c. 126.

Notice to be given before materials are taken from private lands, and two justices shall decide therein.

Order of justices where no appearance.

Power to purchase lands for materials.

7 & 8 Geo. 4, c. 24. Justices to award for materials no larger sum than they could actually be sold for.

(a) As to the form of a magistrate's authority for a surveyor to get materials from private lands, see *post*, No. 80; and of the surveyor's notice, *post*,

No. 79; and *The King v. Manning* (1 Burr. 377), decided under 13 Geo. 3, c. 78.

8. *Repairs, &c.,
of roads.*

3 Geo. 4, c. 126.
Pits or holes made
in getting materials,
to be filled up or fenced off
by surveyor.

Penalty for
neglect.

Penalty on taking
away materials
before surveyor
has discontinued
digging for them,
5*l*.

Repositories for
materials to be
purchased.

Two justices shall
settle any difference
that may
arise as to value.

Canal companies
may lower their
tolls on materials

By 3 Geo. 4, c. 126, s. 99, If any surveyor of any turnpike road, or any person employed by him, shall, by reason of the searching for, digging, or getting, any gravel, sand, stones, chalk, clay, or other materials for repairing any highways, make or cause to be made any pit or hole in any common or other lands or grounds, rivers or brooks as aforesaid, wherein such materials shall be found, the said surveyor shall forthwith cause the same to be sufficiently fenced off, and such fence supported and repaired during such time as the said pit or hole shall continue open, and shall, within 3 days after such pit or hole shall be opened or made, where no gravel, stones, or materials shall be found, cause the same forthwith to be filled up, levelled, and covered with the turf or clod which was dug out of the same; and where any such materials shall be found, within 14 days after having dug up sufficient materials in such pit or hole, if the same is not likely to be further useful, cause the same to be filled up, sloped down, or fenced off, and so continued; and if the same is likely to be further useful, the said surveyor shall secure the same by posts and rails, or other fences, to prevent accidents to persons or cattle; and in case such surveyor shall neglect to fill up, slope down, or fence off such pit or hole in manner, and within the time aforesaid, he or they shall forfeit the sum of 20*s*. for every such default; and in case such surveyor shall neglect to fence off such pit or hole, or to slope down the same, as hereinbefore directed, for the space of six days after he or they shall have received notice for either of those purposes from any justice of the peace, or from the owner or occupier of such several ground, river, or brook, or any person having right of common within such common or waste lands as aforesaid, and such neglect and notice shall be proved upon oath before one or more of the said justices of the peace, such surveyor shall forfeit and pay any sum not exceeding 10*l*., nor less than 40*s*., for every such neglect, to be determined and adjudged by such justice or justices, and to be laid out and applied in the fencing off, filling up, or sloping down such pit or hole, in such manner as the said justice or justices shall direct and appoint; which forfeiture, in case the same be not forthwith paid, shall be levied as other forfeitures are hereinafter directed to be levied. (See p. 1278.)

Sect. 101. If any person or persons shall take away any materials which shall have been gotten, dug, or gathered for the repair or use of any turnpike road, or any materials out of any quarry which shall have been made, dug, or opened up for the purpose of getting materials for any turnpike road, before the surveyor of such road and the workmen employed for getting such materials shall have discontinued working therein for the space of six weeks, (except the owner or occupier of any private grounds, and persons authorised by such owner or occupier to get materials in such quarry for his own private use, and not for sale), every person so offending shall, for every such offence, forfeit and pay any sum not exceeding 5*l*.

Sect. 102. The trustees or commissioners of every turnpike road are hereby empowered to purchase or rent any piece or pieces of land or ground, not exceeding in any one place 6 yards square, on the sides of such road, as repositories for stone, gravel, and other materials for making or repairing the same; and in case any difference shall arise between such trustees or commissioners and the owner of such land or ground, with respect to the value thereof, or the necessity or propriety of taking such land or ground, the same shall be settled and determined by any two of his Majesty's justices of the peace acting in and for the county where the said land or ground shall be situated, in manner hereinbefore directed with respect to getting materials for the repair of any turnpike road.

Sect. 103. It shall and may be lawful for the company of proprietors, or the trustee or trustees for the proprietors of any canal, or of

any railway or tramroad, on which any flint, gravel, stone, or other materials for the repair of any turnpike road shall or may be conveyed, and they are hereby authorised and empowered, to lessen and reduce the tolls and rates imposed by any act of parliament by which any such company shall be appointed, or any other act whatsoever, on the carriage of such flint, gravel, stone, or other materials carried on the said canal or railway, and to appoint such lower tolls and rates to be taken for the carriage and conveyance of the same as the said company or trustees shall think proper; and all such reduced tolls shall and may be collected, taken, and recovered by the same persons and means, and by and under the same powers, provisions, penalties, and forfeitures, as the original tolls might have been taken in case the same should not have been reduced; any act or acts of Parliament, bye-law, or ordinance, or trust deed to the contrary notwithstanding.

By 4 Geo. 4, c. 95, s. 56, it shall and may be lawful for the trustees or commissioners of any turnpike road, and they are hereby empowered, to purchase or rent, with the consent of the owner or proprietor thereof, any piece or pieces of ground within 10 miles of the Royal Exchange, as a repository for materials, such piece or pieces of ground to be of such extent as they may think proper, so as the same shall not exceed in the whole half an acre.

Sect. 71. When and as often as any sum or sums of money shall be directed or ordered to be paid by any justice or justices of the peace, in pursuance of the directions of the said recited act [3 Geo. 4, c. 126] or this act, or any act relating to turnpike roads, as or by way of compensation or satisfaction for any materials or costs, or for any damage, spoil, or injury, of any nature or kind whatsoever, done or committed by such trustees or commissioners, or any person or persons acting by or under their authority, and such sum or sums of money shall not be paid by the said trustees or commissioners to the party or parties entitled to receive the same, within 10 days after demand in writing shall have been made from the clerk to the said trustees or commissioners, or their treasurer, in pursuance of the direction or order made by such justice or justices, and in which demand the order of such justice or justices shall be stated, then and in such case the amount of such compensation or satisfaction shall and may be levied and recovered by distress and sale of the goods and chattels vested in such trustees or commissioners by virtue of any act for making or repairing turnpike roads, or of the goods and chattels of their treasurer for the time being, under a warrant to be issued for that purpose by such justice or justices, which warrant any such justice or justices is and are hereby authorised and required to grant under his hand and seal, or their hands and seals, on application made to him or them for that purpose by the party or parties entitled to receive such sum or sums of money, as or by way of compensation or satisfaction for any such materials, costs, damages, spoil, or injury as aforesaid; and in case any overplus shall remain after payment of such sum or sums of money, and the costs and expenses of hearing and determining the matter in dispute, and also the costs and expenses of such distress and sale, then and in such case such overplus shall be returned on demand to the said trustees or commissioners, or to their treasurer for the time being, as the case may be: Provided always, that it shall and may be lawful for such treasurer to retain, out of any monies which he shall have received or shall receive in pursuance of any such act, or the said recited act, or this act, all such damages, costs, charges, and expenses as he shall have sustained or be put unto by virtue of any such warrant as aforesaid.

8. *Repairs, &c., of roads.*

3 Geo. 4, c. 126.
for repairing turnpike roads.

4 Geo. 4, c. 95.
Ground may be purchased for repository of materials within ten miles of Royal Exchange.

Goods vested in trustees or treasurer

Liable to distress, upon non-payment of compensation for damages or materials.

His indemnity.

5. MILE STONES, &c., TO BE ERECTED.

By 3 Geo. 4, c. 126, s. 119, the said trustees or commissioners shall

3 Geo. 4, c. 126.
Mile stones and

8. *Repairs, &c., of roads.*

3 Geo. 4, c. 126.
direction posts to
be erected (a).

Names of the
towns and villages
to be put up at
the entrance, and
stones to mark the
boundaries of
parishes.

Penalty for de-
facing them, not
exceeding 10*l*.

cause stones or posts to be set up or placed in or near the sides of every turnpike road, at the distance of 1 mile from each other, denoting the distance of any and every such stone or post from any town or place, and also such direction post at the several roads leading out of any such road, or at any crossings, turnings, or terminations thereof, with such inscriptions thereon denoting to what place or places the said roads respectively lead, of such height or size, and to be erected in such situations as they the said trustees or commissioners shall think proper; and also to cause to be painted in legible characters, on some wall or board at the entrance of every town or village, the name of such town or village, and shall also cause stones to be put up marking the boundaries of parishes where such boundaries shall cross any turnpike road, and from time to time to repair or renew such stones, posts, and boards, and keep and continue legible the inscriptions on such stones, posts, walls, and boards respectively; and if any person or persons shall wilfully break, cut down, pull up, or damage any such posts, stones, or boards, or shall obliterate, deface, spoil, or destroy all or any of the letters, figures, or marks, which shall be inscribed or painted thereon, or on any such walls, and be thereof convicted before any justice of the peace for the county, city, or place where such offence shall be committed, by the confession of the party, or by the oath of one credible witness, such person or persons so offending shall forfeit and pay any sum not exceeding 10*l*. for every such offence.

And see "*Malicious Injuries to Property*," and 5 & 6 Will. 4, c. 50, s. 72, *ante*, p. 1054, as to damaging mile stones.

The distances are in all cases to be measured upon the horizontal plane. (*Lake v. Butler*, 5 E. & B. 92; *Jewel v. Stead*, 6 E. & B. 350.)

6. WATERING ROADS.

Extending time
for watering roads.

Stat. 3 Geo. 4, c. 126, s. 120, reciting that, By several acts of Parliament relating to particular turnpike roads, power is given to the trustees to water the roads during certain months in the year, and to take additional tolls on account of the said watering, and the time specified in such acts has been found in many instances too limited to afford to the public all the advantages which might be derived from watering the said roads, enacts, that wherever an act or acts has or have been passed to enable the trustees of any turnpike road or roads to water the same or any part thereof, and to take an additional toll for such watering during a limited time in the said act or acts specified, it shall and may be lawful for the trustees of the said road or roads, at any general meeting held for that purpose, to order that such part of the said road or roads as by the local act or acts relating to the same is allowed or directed to be watered, and a certain additional toll to be taken for such watering, shall be watered, and the said additional toll for watering the same may be demanded and taken for any time between the 1st day of March in every year and the 1st day of November following; and the said trustees shall have, and they are hereby authorised to exercise and enforce all the powers, authorities, remedies, and penalties, for collecting the said additional tolls for watering the roads during the time aforesaid, as they now by law have for any other tolls which may be demanded and collected on the said roads.

7. CONTRACTS FOR REPAIRS.

4 Geo. 4, c. 95.
Agreements may

By 4 Geo. 4, c. 95, s. 78, It shall and may be lawful for the trustees or commissioners of any turnpike road, or for their clerk, surveyor,

(a) The property in-mile stones is vested in the trustees, *ante*, p. 1163.

or any other officer, by their order, to contract and agree, by the year or otherwise, with any person or persons for the making, amending, altering, or maintaining the said road, or any bridges, toll houses, or building thereon, or for any other thing which such trustees or commissioners are by any act for making or maintaining turnpike roads, or the said recited act [3 Geo. 4, c. 126], or this act, or any other act, authorised or empowered to make, build, do, execute, or perform; and all contracts or agreements in writing entered into by the said trustees or commissioners, or, pursuant to any order of the said trustees or commissioners, by their clerk, surveyor, or other officer, with any workmen or other person or persons relating to any matter or thing to be done by virtue of any such act, or the said recited act, or this act, shall be binding on the said trustees or commissioners and their successors, and upon all other parties who shall sign the same, and the heirs, executors, and administrators of such other parties; and that actions and suits shall and may be maintained thereon by the said trustees or commissioners, and damages and costs recovered against the party or parties, or person or persons failing in the performance of such contracts or agreements respectively; and such sum or sums of money as shall be requisite for the due performance of such contract shall be the measure of the damages to be recovered in any action or suit against such party or parties, or person or persons so as aforesaid making default in fulfilling his, her, or their contract or agreement; any law or usage to the contrary in anywise notwithstanding.

Under this section the trustees of a turnpike road have power to make an agreement with the trustees of another road as to the repair of a street in a borough through which street both the roads passed. (*Swinburne v. Robinson*, 1 E. & E. 80.)

By 3 Geo. 4, c. 126, s. 106, It shall and may be lawful for the trustees or commissioners of any turnpike roads to contract and agree (a) with any person or persons liable to the repair of any part of the road under the care and management of such trustees or commissioners, or of any bridges thereon, by tenure or otherwise, for the repair thereof, for such term as they shall think proper, not exceeding 3 years, and to contribute towards the repair of such road or bridges such sum or sums of money as they shall think proper, out of the tolls arising on such turnpike road.

Sect. 107. And whereas many bridges on turnpike roads are by prescription at present liable to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges, from change of times and circumstances, are become no longer sufficiently convenient for the use of the public without being enlarged or otherwise improved; it is therefore enacted, that it shall and may be lawful for any such county or counties, parish or parishes respectively, to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken and lie upon the county or counties in which such bridge is locally situated; and that all rates made for carrying into effect any such composition, agreement, repairs, or improvement, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever. (*Vide "Bridges."*)

Sect. 108. It shall and may be lawful for the trustees or commissioners of any turnpike road, and for such parish or parishes, in like

8. *Repairs, &c., of roads.*

4 Geo. 4, c. 95.
be made for
amending roads,
&c.

3 Geo. 4, c. 126.
Trustees may contract with persons liable to the repairs of roads by tenure.

Composition may be entered into by counties for repairing bridges repaired by parishes.

Compositions may be entered into by trustees and

(a) See form No. 78, *post*.

8. *Repairs, &c., of roads.*

3 Geo. 4, c. 126.
parishes for repair
of bridges.

manner, to enter into a composition or agreement with each other, and by the authority of the persons at present legally competent to make rates for such parish or parishes, whereby, in consideration of such sum or sums of money as shall be agreed upon being yearly paid to the treasurer of the trustees or commissioners entering into such composition or agreement, out of the rates to be raised for the repair of the bridge or bridges the subject thereof, the repairs of any such bridge shall, during the continuance of any act or acts of Parliament under which such trustees or commissioners shall be appointed or act, be undertaken and carried on by the said trustees or commissioners; and that all rates and assessments raised and levied for carrying such composition or agreement into effect, shall, in like manner, be good and valid to all intents and purposes whatsoever.

Drains.

As to repairs of drains in a town, see p. 1259.

8. FINES FOR NOT REPAIRING.

Fines for not re-
pairing.

It has been observed, p. 1208, that the trustees of a turnpike road are not liable to an indictment for neglecting to repair the roads; therefore, where a local act for the making a public highway directed the trustees to repair the same with the monies arising from the tolls, the Court of King's Bench held, that this did not discharge the inhabitants of the township, through which a part of it was carried, from the common-law liability to repair; the public having a right to hold them liable, whether the road was altogether new or substituted for another. The tolls are only an auxiliary fund; the trustees are not indeed liable to an indictment, but the inhabitants may apply to the court for relief. (*R. v. Netherthong*, 2 B. & A. 179, *ante*, p. 1208.)

Where parish in-
dicted for non-
repair of a turn-
pike road, the
court to apportion
the fine between
the parish and the
trustees or com-
missioners.

This application is made under the 3 Geo. 4, c. 126, s. 110, which enacts, that when the inhabitants of any parish, township, or place, shall be indicted or presented (*a*) for not repairing any highway, being turnpike road, and the court before whom such indictment or presentment shall be preferred shall impose a fine for the repair of such road, such fine shall be apportioned, together with the costs and charges attending the same, between the inhabitants of such parish, township, or place, and the trustees or commissioners of such turnpike road, in such manner as to the said court, upon consideration of the circumstances of the case, shall seem just; and it shall and may be lawful for such court to order the treasurer of such turnpike road to pay the sum so proportioned for such turnpike road out of the money then in his hands or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the securities of the creditors who have advanced their money upon the credit of the tolls to be raised thereupon, which order shall be binding upon such treasurer, and he is hereby authorised and required to obey the same, *ante*, p. 1069.

The true construction of this section is, that the court which imposes the fine shall have power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the Court of King's Bench by *certiorari*, it was held that the Court of King's Bench might apportion the fine. (*R. v. Upper Papworth*, 2 East, 413. And see *R. v. Pembridge (Inhab. of)*, 6 Jur. 1037.)

(a) Presentments are now abolished by 5 & 6 Will. 4, c. 50, s. 99.

IX. Tolls.

9. Tolls.

The imposition of toll, to be applied to the maintenance of the road, is the revival of an old principle, but with some difference in its adaptation to practice. Under the ancient system of tenures, the lord of the soil frequently claimed the privilege of receiving toll from all who travelled along his highway; nor was this esteemed a mere bounty, for he was liable, in consideration of such toll, to keep the way in good order, and, in some countries, even to defend the passengers from depredation. (*Wellbeloved on Highways*, p. 252. See *ante*, p. 1150.)

Tolls.

Division of subject.

We will divide our considerations as to these tolls as follows :—

1. *The general Power to collect*, p. 1219.
2. *What Tolls payable*, p. 1220.
3. *Tolls for Overweight, and Explanation of Local Acts as to Double Tolls*, p. 1220.
4. *Tolls for Narrow Wheels*, p. 1225.
5. *Exemptions from Tolls*, p. 1228.
6. *Power to reduce or advance Tolls*, p. 1241.
7. *Composition for*, p. 1243.
8. *Toll Houses*, p. 1243.
9. *Toll Gates, Erecting and Lighting*, p. 1244.
10. *Tables of Tolls and Tickets*, p. 1246.
11. *Recovery of Tolls and Penalty for Evasion*, p. 1246.
12. *Letting to farm Tolls, and Duties and Powers of Leases, &c.*, p. 1248.
13. *Mortgaging of Tolls*, p. 1253.

1. GENERAL POWER TO COLLECT TOLLS.

By 9 Geo. 4, c. 77, s. 16, it shall and may be lawful for the trustees of any turnpike road, or any person appointed or continued to be appointed collector of the tolls to be taken by virtue of any local turnpike act, to demand and take every day (such day, for the purposes of all local turnpike acts, being computed from 12 at night to 12 of the next succeeding night) the several and respective tolls to be mentioned in any such act, at the several and respective toll gates and turnpikes, or side bars and chains, which are or shall be continued or erected by virtue of this act, or of any local turnpike act, in, upon, across, or on the sides of any turnpike road (a) or any part or parts thereof, and which tolls or sums of money shall be demanded and taken as aforesaid, before any horses, cattle, or carriage whatsoever shall be permitted to pass through any toll gate or turnpike, or side bar or chain; and the tolls or sums of money to be levied and collected, by virtue of any local turnpike act, shall be and the same are hereby vested in the trustees of such act for the purposes thereof, in manner to be thereby directed.

Tolls to be collected every day.

What a day.

As to penalties for extortion, see p. 1189.

(a) A local act empowered trustees of a turnpike road leading into a town to collect tolls from persons passing more than a hundred yards along it, and to borrow money on the credit of the tolls. By an act for improving the town, the road trustees were prohibited from repairing a certain portion of it nearest the town,

and the town commissioners were to maintain it in future :—Held, that the road trustees might still take the same tolls for passing over that part, and that it still continued part of the same turnpike road for all purposes but that of repair. (*Phipson v. Harvett*, 1 C. M. & R. 473.)

9. Tolls.

2. WHAT TOLLS PAYABLE IN GENERAL.

Amount.

The local acts regulating the turnpike road always regulate the amount of toll to be paid (*a*).

Besides this, there are some general provisions in the general turnpike acts applicable to all roads, thus—

Tolls to be paid upon carriages affixed to others.

Stat. 3 Geo. 4, c. 126, s. 31, reciting, that coaches, chariots, chaises, chairs, carts, and other carriages, sometimes pass through turnpike gates affixed, tied or secured to waggons or carts, and horses are sometimes sent under the charge of the drivers of such waggons and carts, and are fastened thereto; and that it is expedient to determine what tolls such coaches, chariots, chaises, chairs, carts, and other carriages, and horses, ought to pay on passing through such gates; it is enacted, that where by any act for repairing any turnpike road no toll is directed to be taken for or in respect of any coach, chariot, chaise, or any other carriage whatsoever with 4 wheels, passing through any turnpike gate on such road, affixed, tied, or secured to any waggon or cart, the same toll, and no more, shall and may be demanded and taken for and in respect of such coach, chariot, chaise, or other carriage, as if the same had passed through drawn by 2 horses; and where, by any act for repairing any turnpike road, no toll is directed to be taken for or in respect of any chair, cart, or other carriage whatsoever, with 2 wheels only, passing through any turnpike gate on such road, so affixed, tied, or secured to any waggon or cart as aforesaid, the same toll, and no more, shall and may be demanded and taken for and in respect of such chair, cart, or other carriage with 2 wheels only, as if the same had passed through drawn by one horse only; and where any horse shall be fastened to but not used in drawing any waggon, cart, or other carriage, such horse shall not be liable to a higher toll than a single horse; provided that if any coach, chariot, chaise, chair, cart, or other carriage so affixed, tied, or secured to any waggon or cart, shall have any goods conveyed therein other than the harness thereto belonging, and such articles of package as may be necessary for the protection of such carriages, the same shall be liable to double the toll hereby imposed.

Two oxen to be considered as one horse.

Sect. 38. In all carriages wherein oxen or neat cattle shall be used, two oxen or neat cattle shall be considered as one horse, for all the purposes mentioned in this act, or any particular turnpike act, with respect to tolls or other things.

Additional toll for watering.

An additional toll is given by some local acts for watering; see also 3 Geo. 4, c. 126, s. 120, p. 1216.

3. TOLLS FOR OVERWEIGHT AND EXPLANATION OF PROVISIONS IN LOCAL ACTS AS TO DOUBLE TOLLS (*b*).

Regulating the weights of waggons, &c.

Stat. 3 Geo. 4, c. 126, s. 12, for regulating the weights to be allowed to waggons, wains, carts, and other carriages, enacts, that the weights hereafter next specified (*c*) shall be allowed to every waggon, wain,

and *Liverpool Canal Company v. Hustler*, 1 B. & C. 424.)

(*b*) See table of weights, *post*, No. 91.

(*a*) Where the language of an act of Parliament, obtained by a company for imposing a rate or toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public. (*Barret v. Stockton and Darlington Railway Company*, 2 M. & G. 134.) This case has been affirmed in error. See *Stockton and Darlington Railway Company v. Barret*, 3 Sc. N. R. 803; *Bussey v. Storey*, 4 B. & Ad. 109. *The Leeds*

(*c*) See 4 Geo. 4, c. 95, ss. 8, 9, which enabled lessees, &c. of tolls, and penalties for overweight, whose contracts would not expire until after the 1st January, 1824, to discharge themselves from their contracts, so far as regarded such tolls and penalties, on giving a certain notice on or before the 1st September, 1823, and trustees of roads, in cases where such

cart, or other such carriage, (that is to say,) to every waggon, wain, or other four-wheeled carriage, having the fellies of the wheels thereof of the breadth of 9 inches at the bottom or soles thereof, together with the loading of such carriage, 6 ton 10 cwt. in summer, and 6 ton in winter; to every cart or other such two-wheeled carriage, having the fellies of the wheels thereof of the like breadth, together with the loading of such carriage, 3 ton 10 cwt. in summer, and 3 ton in winter; to every waggon, wain, or other such four-wheeled carriage, having the fellies of the wheels thereof of the breadth of 6 inches and less than 9 inches at the bottom or soles thereof, together with the loading of such carriage, 4 ton 15 cwt. in summer, and 4 ton 5 cwt. in winter; to every cart or other such two-wheeled carriage, having the fellies of the wheels thereof of the breadth last mentioned at the bottom or soles thereof, together with the loading of such last-mentioned carriage, 3 tons in summer, and 2 ton 15 cwt. in winter; to every waggon, wain, or other such four-wheeled carriage, having the fellies of the wheels thereof of the breadth of 4 inches and a half, and less than 6 inches at the bottom or soles thereof, together with the loading of such carriage, 4 ton 5 cwt. in summer, and 3 ton 15 cwt. in winter; to every cart or other such two-wheeled carriage, having the fellies of the wheels thereof of the breadth last-mentioned at the bottom or soles thereof, together with the loading of such carriage, 2 ton 12 cwt. in summer, and 2 ton 7 cwt. in winter; to every waggon, wain, or other such four-wheeled carriage, having the fellies of the wheels thereof of a less breadth than $4\frac{1}{2}$ inches at the bottom or soles thereof, together with the loading of such carriage, 3 ton 15 cwt. in summer, and 3 ton 5 cwt. in winter; to every cart or other such two-wheeled carriage, having the fellies of the wheels thereof of the breadth last-mentioned, together with the loading of such carriage, 1 ton 15 cwt. in summer, and 1 ton 10 cwt. in winter; and for the several purposes of this act, it shall be deemed summer from the 1st of May to the 31st of October, both days inclusive, and winter from the 1st day of November to the 30th day of April, both days inclusive.

Sect. 13. To every caravan, or other four-wheeled carriage used for the conveyance of goods, and built and constructed with springs, shall be allowed the weights following; that is to say, for every such carriage 3 tons 15 cwt. in winter, and 4 tons 5 cwt. in summer.

By the 4 & 5 Will. 4, c. 81, after reciting the above 12th and 13th sections, and that doubts have arisen whether the said last-recited provision extends to waggons, wains, and other such wheeled carriages when built and constructed with springs, although such waggons, wains, and other four-wheeled carriages, if not on springs, would be comprehended within the said first-recited provision: it is enacted, that the said last-recited provision shall not be deemed or construed to extend to waggons, wains, or other four-wheeled carriages having the fellies of the wheels thereof of the breadth of not less than $4\frac{1}{2}$ inches at the bottom or soles thereof, notwithstanding the same may be built and constructed with springs; any thing in the said recited act or any other act to the contrary notwithstanding.

By 3 Geo. 4, c. 126, s. 14, to each and every dray with 2 wheels of not less than $4\frac{1}{2}$ inches in breadth, and drawn by not more than 3 horses, and used in London, or within the bills of mortality, there shall be allowed at all times of the year, together with the loading of such dray, the full weight of 2 tons 16 cwt.; any thing in this or any other act of Parliament to the contrary notwithstanding.

Sect. 15. It shall and may be lawful for all trustees and commis-

9. *Tolls.*

3 Geo. 4, c. 126.

Additional weights for carriages built with springs.

4 & 5 Will. 4, c. 81.

Two-wheeled drays drawn with three horses, in London, or within the bills of mortality, allowed 2 tons 16 cwt.

notices were given, to enter into new contracts. Clauses of similar import to these sections were contained in the 3 Geo. 4, c. 126, provided notice

was given before September, 1822, as to contracts which did not expire till January, 1823.

9. Tolls.

3 Geo. 4, c. 126.
Additional tolls
for overweight (a).

sioners appointed by or under any act or acts of Parliament for the making or maintaining of any turnpike road, or for any person or persons authorised by them, and they are hereby empowered and required to receive, take, and demand, over and above the tolls payable by any act or acts of Parliament now in force, or hereafter to be passed, the following sums of money as additional toll for every cwt. of 112 lbs. to the 100, which any waggon, cart, or other such carriage, together with the loading thereof, shall weigh at any weighing engine over and above the weights hereinbefore allowed to each of them respectively, (that is to say,) for the first and second hundred of such overweight, the sum of 3 pence for each 100; for every hundred of such overweight above 200 and not exceeding 500, the sum of 6d.; for every hundred of such overweight above 500 and not exceeding 1000, the sum of 2s. 6d.; and for every hundred of such overweight exceeding 2000, the sum of 5s.; which said additional sum or tolls hereby granted and made payable at any weighing engine, shall and may be levied and recovered in any of the cases aforesaid, in such manner as any other toll or duty payable on the road on which any such weighing engine shall be erected, is or shall be by law to be levied and recovered, and the monies arising therefrom shall be applied to the repairs of the turnpike road on which the same shall be recovered.

Composition for.

By the 19th section, no composition was allowed to be made for tolls for overweight; but that provision is repealed by 4 Geo. 4, c. 95, s. 12.

Reduction of tolls
for.

2 & 3 Will. 4, c. 124.
Explanation of
local acts as to
double tolls.

See p. 1242, as to the reduction of tolls for overweight.

By 2 & 3 Will. 4, c. 124, intituled, "*An Act to explain certain provisions in local acts of Parliament relating to double toll on turnpike roads*," after reciting that divers local acts authorise tolls to be taken at certain turnpike-gates erected upon the sides of such turnpike roads, in respect of waggons, carts, and carriages, or the horse or horses, or other beast or beasts drawing the same, passing through the said turnpike gates: and that many of the said acts authorise double toll to be taken at such toll-gates or turnpike-gates at particular periods of the year, for or in respect of waggons, carts, or carriages laden with several heavy goods and articles therein respectively specified, or for or in respect of the horse or horses or other beast or beasts drawing the same, passing through the said gates: it is enacted that in every case in which by virtue or under the authority of any local act now or hereafter to be made, for making, repairing, or improving any turnpike road in that part of Great Britain called England, double toll as aforesaid shall be imposed on any waggon, cart, or other carriage, or any horse or horses, or other beast or beasts drawing the same, which at the time of first passing through any turnpike-gate or toll-gate shall have been liable to and shall have paid single toll only, shall, on repassing through the same turnpike-gate or toll-gate on the same day, before 12 of the clock at night, so laden as to be subject to double toll, be liable to pay one other single toll only and no more, making, together with the toll first paid, two single tolls in the whole, any thing in any local act or acts to the contrary in anywise notwithstanding.

Penalty for overweight not to be
twice incurred on
same day, &c.

Sec. 2. Provided also, that henceforth, notwithstanding any provision to the contrary, any waggon on which a penalty for overweight has been levied shall, on receipt of a ticket to that effect, be exempted from any further penalty for overweight on that day and on

(a) Under the prior act, 12 Geo. 3, c. 82, s. 2, it was held, that the additional toll to be paid by waggons for overweight, must be according to the progressive proportions named in that

act, and not a gross charge at the highest additional toll incurred upon the gross overweight. (*Chamberlain v. Longhurst, Cowp. 365.*)

the same trust, provided there be no alteration of the loading of such waggon.

9. *Tolls.*

It will be seen that this latter provision omits the usual words, "cart or wain, or other carriage." 2 & 3 Will. 4, c. 124

Exemption from Tolls, &c. for Overweights.—By 4 Geo. 4, c. 95, s. 17, in case where any exemption from toll shall be claimed or allowed under the provisions of the said recited act [3 Geo. 4, c. 126] or this act, or any other act or acts of Parliament for repairing and maintaining any turnpike road, such exemption shall not extend to or be allowed for the additional tolls imposed by the said recited act, and directed to be taken for every cwt. of 112 lbs. to the 100, which any waggon, cart, or other such carriage, together with the loading thereof, shall weigh at any weighing engine, over and above the weights in and by the said recited act allowed to each of them respectively, unless the waggon, wain, cart, or other such carriage, in respect of which the exemption shall be claimed, shall likewise be by the said recited act, or this or some other act or acts, specially exempted from such additional tolls for overweight; but in all cases (where not specially exempted) the said additional tolls shall be paid, and only the original toll allowed.

4 Geo. 4, c. 95.
Exemptions from tolls not to extend to tolls for overweight, unless such tolls are also specially exempted.

Sect. 19. Nothing in the said recited act [3 Geo. 4, c. 126] or this act contained, relating to the breadth of the wheels of carriages, or to the regulations of weight, or to the tolls payable in respect of the wheels, or of the weight of carriages, shall extend or be construed to extend to any chaise marine, coach, landau, berlin, barouche, phaeton, sociable, chariot, calash, hearse, break, chaise, curricie, gig, chair, or taxed cart, or any cart, not drawn by more than one horse or two oxen.

Regulations as to weight, &c., not to extend to certain coaches, &c.

A cart upon which duty had been imposed and paid in the previous year was held to be a taxed cart within the meaning of a local act, which imposed a certain toll upon every horse or other beast drawing a "taxed cart." (*Purdy v. Smith*, 28 L. J. M. C. 150.)

By 3 Geo. 4, c. 126, s. 35, No person owning or driving, or causing to be driven, any waggon, wain, cart, or other carriage, provided for the service of his Majesty's forces, or conveying any ordnance or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, shall be subject to any additional toll, penalty, or forfeiture for overweight; nor shall any such waggon, wain, cart, or other carriage, or the horse or horses drawing the same, while so employed, be stopped or detained by reason of any weight in any such waggon, wain, cart, or other carriage, or of being drawn by any number of horses or oxen; but it shall be lawful for the owner or driver of any such waggon, wain, cart, or other carriage, to put any number of horses or oxen to such waggon, wain, cart, or other carriage; any thing in any act or acts of parliament relating to highways or turnpike roads, or in this act contained to the contrary notwithstanding.

3 Geo. 4, c. 126.
Carriages conveying king's stores, &c.

By 4 Geo. 4, c. 95, s. 21, the regulations of weight in the said recited act [3 Geo. 4, c. 126] or this act, mentioned and provided, shall not extend to any waggon, wain, cart, or other carriage, carrying only one block, plate, roll, or vessel of iron or other metal, or compounded of any two or more metals cast, wrought, or united in one piece.

4 Geo. 4, c. 95.
of metal, &c.

By 3 Geo. 4, c. 126, s. 16, the regulations of weight hereinbefore mentioned and provided shall not extend, or be deemed or construed to extend, to any waggons, carts, or other carriages carrying only manure (a) or lime for the improvement of land, or any hay, straw,

3 Geo. 4, c. 126.
Carrying manure, &c.

(a) A cart having carried some fruit to its owner's house in London, returned with a load of manure, and

the empty fruit baskets; and it was held to be within the exemption. (2 *Campb.* 393.)

9. *Tolls.*

3 Geo. 4, c. 126.
or one log of timber, &c.

fodder or corn unthrashed, except hay, straw, fodder, or corn carried for sale; nor to any waggons, carts, or other carriages, carrying only one tree or one log of timber, or one block of stone, or one cable or rope; nor shall the said regulations of weight extend to any chaise marine, coach, berlin, barouche, sociable, chariot, calash, hearse, break, gig, chaise, or taxed cart.

Power given for erecting weighing machines.

Weighing Engines, and Mode of enforcing Tolls for Overweight.]—By 3 Geo. 4, c. 126, s. 21, it shall and may be lawful for the said trustees or commissioners, at any of their respective meetings, if they think proper, to order (a) and cause to be built and erected, at any of the turnpikes or toll gates on the roads under their care and management, or at such distance therefrom as they shall think expedient, one or more crane or cranes, machines, or engines, with a suitable house or other building thereto, proper for the weighing of waggons or carriages conveying any goods or merchandise whatsoever, and by notice on a board for that purpose, to be put up at every such weighing machine, to order and direct all and every such waggons or carriages which shall come within 100 yards of any crane, machine, or engine, to be weighed, together with the loading thereof.

Where turnpike roads on different trusts meet, trustees to fix on some place for erecting a weighing engine, and proportion the expense, &c.

Sect. 25. When two or more turnpike roads meet at or near the same place, it shall and may be lawful for the trustees or commissioners of such turnpike roads respectively, at a meeting to be held for that purpose, to fix upon some convenient place to erect a weighing engine upon, which will accommodate all such turnpike roads, and, by agreement amongst themselves at such meeting, to proportion the expenses which may attend the making, erecting, maintaining, and keeping in repair such weighing engine, and likewise the money arising from forfeitures to be incurred for overweight at such weighing machine, amongst all such turnpike roads in such manner as to them shall appear just and reasonable (b).

Evading toll.

Sect. 20 imposes a penalty for unloading, &c., goods, &c., to evade the payment of the toll for overweight. (See the section, *post*, p. 1247.)

Where weighing engines are erected, toll-keepers to weigh waggons, &c. of greater weight than allowed, and not suffer them to pass without paying the additional toll.

Sect. 22. The keeper of every toll-gate or bar where any weighing engine shall be erected, or any other person appointed or to be appointed by the trustees or commissioners, or by their lessee or lessees, to the care of such weighing engine, shall, and is hereby required to weigh all such waggons, carts, and other carriages liable to be weighed, which shall pass loaded through such gates or bars respectively, and which he shall believe to carry greater weights than are allowed to pass without paying the said additional toll; and if any collector or person so appointed shall permit any such waggon, cart, or other carriage, to pass by or through any such toll-gate with greater weights than are hereby allowed, without weighing the same and receiving such additional tolls as aforesaid, he shall, for every such offence, forfeit the sum of 5*l.*; and if the owner or driver of any waggon, cart, or other carriage, shall refuse to allow the same to be weighed, or shall resist any gate keeper or toll collector in weighing the same, every owner or driver so offending shall forfeit and pay any sum not exceeding 5*l.*

Penalty on obstructing the weighing.

Trustees, &c., may cause waggons, &c., to return to be weighed, in case of neglect of duty of collector.

Sect. 23, in order to detect the said collector or receiver in any fraudulent contrivance or neglect of duty in the matters aforesaid, enacts, That it shall and may be lawful for any trustee or commissioner or surveyor of every turnpike road, if he shall suspect any such connivance or neglect as aforesaid, to cause any waggon, cart, or other carriage which shall have passed through any toll-gate where any weighing engine shall be erected, and shall not have passed above

(a) See form No. 90.

(b) See form No. 92.

three hundred yards beyond such toll-gate, to return to such weighing engine, and be there weighed with the loading which passed through such toll-gate, in the presence of such trustee or commissioner, or surveyor, upon requiring the driver thereof to drive such carriage back to such weighing engine, and upon paying or tendering to him the sum of 1s. for so doing, which sum of 1s. shall be returned to the person paying the same, if upon weighing such carriage and the loading thereof it shall be found above the weight hereby allowed.

Sect. 24. For the better enforcing the authority of this act, enacts, That the surveyors of every turnpike road shall, and they are hereby authorised and required to make convenient places for turning such carriages upon every such turnpike road where any weighing engine shall be erected, within 300 yards of such toll-gate, on each side thereof, if the ground will admit of the same; and if the driver of any such carriage, being so requested to return with his carriage to such weighing engine, shall neglect or refuse so to do, he shall forfeit any sum not exceeding 5*l.*; and it shall and may be lawful for any peace officer or other person or persons being then present, upon such neglect or refusal, to drive and take such carriage back to such weighing engine, in order to be weighed as aforesaid.

9. Tolls.

3 Geo. 4, c. 126.

Surveyors to make convenient places for turning carriages where weighing engines are erected.

Drivers refusing to return, to forfeit not exceeding 5*l.*

Tolls for Overweight exempt from Poor's Rates.—See *ante*, p. 1188, as to tolls or penalties for overweight, or any person in respect of the same, &c., not being liable to be rated or assessed towards the payment of any poor's rates, or any other public or parochial rate or levy whatsoever.

Tolls for overweight, &c., exempt from poor's rate, &c.

4. TOLLS FOR NARROW WHEELS.

By 3 Geo. 4, c. 126, s. 7, from and after the said first day of January, 1823, the trustees or commissioners appointed by virtue or under the authority of any act or acts of parliament made or to be made for making or maintaining any turnpike road, shall, and they are hereby required to demand and take, or cause to be demanded and taken, for every waggon, wain, cart, or other such carriage, having the fellics of the wheels thereof of less breadth than 4½ inches at the bottom or soles thereof, or for the horse or horses or cattle drawing the same, one-half more than the tolls which are or shall be payable for any carriage of the same description, having the wheels thereof of the breadth of 6 inches; and for every waggon, wain, cart, or other such carriage, having the fellics of the wheels thereof of the breadth of 4½ inches and less than 6 inches at the bottom or soles thereof, or for the horse or horses or other cattle drawing the same, one-fourth more than the tolls or duties which are or shall be payable on any carriage of the like description, having the wheels thereof of the breadth of 6 inches, by any act or acts of parliament now in force, or hereafter to be passed, for making or maintaining any turnpike road, before any such waggon, wain, cart, or other carriage respectively shall be permitted to pass through any turnpike gate or gates, bar or bars, where tolls shall be payable by virtue of any such acts (a). (See *post*, p. 1240.)

Waggons, &c., having the fellics of wheels of less breadth than four and a half inches to pay one-half more than the toll payable on waggons, &c., having six-inch wheels.

Where the wheels shall be four and a half inches and less than six inches in breadth, one-fourth more toll shall be paid.

(a) Where a turnpike act, passed after the 13 Geo. 3, c. 84, imposed a toll of 1*s.* 6*d.* on every four-wheeled waggon, with wheels of a less breadth than six inches, and drawn by four horses; 1*s.* on every such waggon drawn by three horses; 9*d.* by two, and 4½*d.* by one; and so in like proportion on waggons with two wheels drawn by four, three, two, or one horse

or horses; it was held, that only those respective sums could be demanded for toll, and that the 23rd section of the 13 Geo. 3, c. 84, by which one-half more than the toll payable for waggons with wheels of a less breadth than six inches might be taken, was virtually repealed by the other act. (*Ridge v. Garlick*, 8 Taunt. 424.)

9. Tolls.

3 Geo. 4, c. 126.

Where waggons or carts are constructed in a particular manner, trustees may make order that the toll to be taken shall not be less than two-thirds of the full toll.

* *Sic.*

4 Geo. 4, c. 95.
Breadth of wheels, or regulations as to weight, &c., not to extend to coaches, &c. (a).

3 Geo. 4, c. 126.
Power to trustees to measure wheels.

Penalty on obstructing measurement, not exceeding 5*l*.

Penalty on toll collector allowing waggons to pass

Sect. 9. Where any waggon or cart shall have the sole or bottom of the wheels thereof rolling on a flat surface, and the nails of the tire of such wheels countersunk and be* cylindrical, (that is to say), of the same diameter on the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface, and shall have the opposite ends of the axletrees of such waggon, cart, or other carriage, so far as the same shall be inserted into the respective naves of the wheels thereof, horizontal, and in the continuance of one straight line, without forming any angle with each other, and in each pair of wheels belonging to such carriage, the lower parts when resting on the ground shall be at the same distance from each other as the upper parts of such wheels, it shall and may be lawful for the trustees or commissioners of any turnpike road, at a general meeting, if they shall think fit so to do, to make an order for every such waggon and cart to pass through any toll-gate or bar under the superintendence of the trustees or commissioners making such order, upon paying only so much of the tolls and duties as shall not be less than two-thirds of the full toll or duty payable by any turnpike act, on such waggon, cart, or other carriage, and the horse or horses or cattle drawing the same.

By 4 Geo. 4, c. 95, s. 19, Nothing in the said recited act [3 Geo. 4, c. 126] or this act contained relating to the breadth of the wheels of carriages, or to the regulations of weight, or to the tolls payable in respect of the wheels, or of the weight of carriages, shall extend or be construed to extend to any chaise marine, coach, landau, berlin, barouche, phaeton, sociable, chariot, calash, hearse, break, chaise, curricule, gig, chair, or taxed cart, or any cart not drawn by more than one horse or two oxen.

By 3 Geo. 4, c. 126, s. 11, It shall and may be lawful for any trustee or commissioner of any turnpike road, and for every collector or his deputy or deputies, or other person acting by or under the authority of the trustees or commissioners of any turnpike road, or of their lessee or lessees of tolls, to measure and examine, or cause to be measured and examined, the breadth and construction of the wheels of every waggon, cart, or other such carriage passing on such turnpike road; such measurement and examination to take place, if the trustee, commissioner, or other authorised persons making the same, shall so require, previously to such waggon, cart, or other carriage being allowed to pass through any toll-gate or bar at which toll shall be payable; and if any owner or driver of any such waggon, cart, or other carriage, shall turn or drive out of the road, in order to avoid or evade the measuring of the wheels of such waggon, cart, or other carriage, or if any such owner, driver, or any other person, shall refuse to allow the wheels of any such waggon, cart, or other carriage to be measured, and the construction thereof examined, or shall attempt to pass through any toll-gate or bar before such measurement and examination shall be made, (the same having been required), or shall in any way hinder or obstruct any such trustee or commissioner, or other authorised person, in making such measurement and examination, every such owner, driver, or other person so misbehaving, shall, for every such offence, forfeit and pay any sum not exceeding 5*l*.; and that it shall not be lawful for any such waggon, cart, or other carriage, not permitted to be measured or examined as aforesaid, to pass along any turnpike road; and if any collector or his deputy, or any other person appointed to collect the tolls, shall allow the same

(a) The repealed section of 3 Geo. 4, c. 126, extended to all carts for the conveyance of passengers or light

goods or articles, and the number of horses was not limited thereby.

to pass before such measurement and examination shall be made, (the same having been required,) every collector, deputy, or other person, shall, for every offence, forfeit and pay any sum not exceeding 5*l*.

9. *Tolls.*

3 Geo. 4, c. 126.
before measurement, &c., not exceeding 5*l*.

4 Geo. 4, c. 95.
Where 13 Geo. 3, c. 84, in respect of tolls to be taken for carriages with wheels of certain description has not been acted on, the tolls shall be payable according to the scale herein specified.

Scale of Tolls under prior Enactments or Local Acts.—By 4 Geo. 4, c. 95, s. 5, Where the trustees or commissioners of any turnpike road shall not, previously to the passing of the said recited act, [3 Geo. 4, c. 126,] have taken and collected on the road under their care and management, the additional tolls on waggons, wains, carts, or carriages having the wheels thereof of less breadth or gauge than 6 inches from side to side at the bottom or sole thereof, and on the horses or beasts of draught drawing the same, directed to be taken and collected by stat. (13 Geo. 3, c. 84), and the particular or local act or acts of parliament in execution whereof the said trustees or commissioners shall act, shall not have provided a scale of tolls applicable to the road under their care and management, such trustees or commissioners shall, from and after the 1st day of January, 1824, continue to take, collect, and receive, for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of less breadth or gauge than 4½ inches from side to side at the bottom or sole thereof, or for the horses or beasts of draught drawing the same, the same tolls as are in and by such particular or local act or acts payable in respect of such waggons, wains, carts, or other such carriages; and for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of the breadth or gauge of 4½ inches, and less than 6 inches at the bottom or soles thereof, or for the horses or beasts of draught drawing the same, one-sixth less than the tolls which are or shall be payable for the same; and for every waggon, wain, cart, or other such carriage having the fellies of the wheels thereof of the breadth of 6 inches or upwards at the bottoms or soles thereof, or for the horse or horses drawing the same, one-third less than the tolls or duties which are or shall be payable for the same by any act or acts of parliament made for making, repairing, or maintaining any turnpike road.

Sect. 6. Where any particular act or acts of parliament now in force, for the making, repairing, or maintaining any turnpike road, shall direct a higher or lower rate of toll or tolls to be collected and taken on any waggon, wain, cart, or other such carriage, or on the horse or horses drawing the same, regulated by or in respect of the greater or lesser breadth of the wheels of such waggon, wain, cart, or other such carriage, and where, in addition to the tolls received under such particular act or acts, the additional tolls in respect of the breadth of wheels authorised to be taken by the 13 Geo. 3, shall not have been collected and imposed, it shall and may be lawful for the trustees or commissioners acting in execution of any such particular act or acts of parliament, from and after the 1st day of January, 1824, to continue to collect the tolls directed to be taken under the powers and provisions of such act or acts of parliament, in execution whereof they shall act, and they shall not impose the additional tolls authorised and required to be levied by the said recited act on waggons, wains, carts, or other such carriages having the fellies of the wheels thereof of less breadth than 6 inches.

By a local act, 1 & 2 Geo. 4, c. 25, a scale of tolls was prescribed, by which a toll of 4½*d*. was imposed for each horse drawing any waggon drawn by four horses, whether the fellies of the wheels were of the breadth of 6 inches and upwards, or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by the 13 Geo. 3, c. 84:—Held, that such increased toll (6½*d*.) was properly demanded; the case not falling within the exemption contained in the 5th and 6th sections of the 4 Geo. 4, c. 95. (*Pickford v. Davis*, 4 M. & S. 683.)

Where there is a scale of tolls adapted to the width of wheels, and additional tolls under 13 Geo. 3, not collected, the scale of tolls imposed by the local act to continue.

9. Tolls.

4 Geo. 4, c. 95.

Sect. 10 provides, that there shall be no exemption from toll, except in certain cases, unless the felloes of the wheels of the carriage, &c., be $4\frac{1}{2}$ inches wide. (See the enactment, *post*, p. 1240.)

By the 7th section of the above act, the trustees had power, for a certain time after its passing, to reduce the tolls, and fix their amount, according to the provision of the act; and also to compound and agree with the lessors of the tolls for doing so. (See this enactment, *post*, p. 1242.)

(See as to the penalties for improper wheels, *post*, p. 1273.)

5. EXEMPTIONS FROM TOLLS.

By the local act.

The local act regulating the turnpike trust, usually contains exemptions of persons from tolls, and that act must always be consulted (*a*). There are, however, some provisions in the general turnpike acts, regulating such exemptions, and creating others.

3 Geo. 4, c. 126, not to take away exemptions granted by local acts.

In the first place, it should be observed, that by the 4 Geo. 4, c. 95, s. 26, nothing herein, or in the said recited act [3 Geo. 4, c. 126] contained, shall extend, or be deemed or construed to extend to repeal or take away any exemptions from toll which shall have been granted or allowed by any act for making or repairing any turnpike road. [See a similar clause in 5 & 6 Will. 4, c. 18, s. 2, as to the exemption for manure, *infra*.]

5 & 6 Will. 4, c. 18. No toll to be taken for manure, save and except lime.

Carts, &c., carrying Manure, &c., or Materials for Roads, &c.—By 5 & 6 Will. 4, c. 18, s. 1, it is enacted, no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land (save and except lime) (*b*), and the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed.

A cart carrying manure to a place of deposit where it was to be kept either for use or for sale for manuring land is exempt from toll by this section. (*Reg. v. Freeke*, 25 L. J. M. C. 64.)

Not to exempt from toll imposed by local act.

Sect. 2. Provided that nothing herein contained shall extend or be construed to extend so as to exempt any waggon, cart, or other carriage laden with dung or manure for manuring land, or any horse or other beast drawing the same, from any toll imposed in respect thereof by virtue of any local act or acts now passed whereby such toll has been imposed for the maintenance of the roads therein respectively mentioned.

Uncrushed bones, which are taken through a turnpike to a farm, to be there crushed and part of them used as manure, and the residue to be afterwards sold and to be used as manure at other places, are exempt from toll under the statute. (*Pratt v. Brown*, 8 C. & P. 244, *per Gurney*, B.)

See the general exemption for manure in the 3 Geo. 4, c. 126, s. 32.

3 Geo. 4, c. 126. Exemptions from toll on manure, &c., or materials for roads, contained in any act, to be in force, notwithstanding the

By 3 Geo. 4, c. 126, s. 26, in every case in which, under any act or acts of parliament relating to any turnpike road, there is an exemption from toll or duty in respect of any horse, mule, ass, ox, waggon, cart, or other carriage, drawing or carrying any dung, mould, marl, or compost, of any nature or kind soever, for improving or manuring the land, or hay, straw, or any other fodder for cattle, or

Meaning of "stage waggon" when made use of in exempting clause in a turnpike act.

(*a*) The legal meaning of the term "stage waggon," when made use of in an exempting clause in a turnpike act, is a conveyance that carries goods or passengers for hire from one fixed point to another, at stated intervals.

(*R. v. Ruscoe*, 8 A. & E. 386. See *post*, p. 1233, *n*.)

(*b*) See as to lime, 4 Geo. 4, c. 16, s. 1, 3 & 4 Vict. c. 51, *post*, p. 1240; and 4 Geo. 4, c. 95, s. 23, *post*, p. 1230.

materials for repairing any turnpike road or highway, such exemption shall be deemed to extend in respect of every such waggon, cart, or other carriage, and also in respect to the cattle drawing the same, going empty, or loaded only with implements necessary for more convenient carriage, or loading or unloading such lading, or returning empty, or with such implements as aforesaid, having been so laden, notwithstanding the said waggon, cart, or other carriage shall, for the purpose aforesaid, go to or return from any parish or place in which the said turnpike does not lie (a).

But by s. 27, for the preventing of frauds on toll collectors by waggons, carts, or other carriages passing empty, or loaded only with implements necessary for the more convenient carriage of, or for loading or unloading manure or materials for the repair of any turnpike road or highway, through turnpike gates, under pretence of going for such manure or materials, the owner or driver of every such empty waggon, cart, or carriage, claiming the same exemptions or any of them (b), shall in all cases pay the toll in respect of such waggon, cart, or other carriage, before the same shall be permitted to pass through such turnpike gate; and the collector of such toll shall thereupon deliver to such owner or driver a ticket, to be marked "*manure exemption*" or "*road materials*" (as the case may be), with the name of the gate and the date when delivered, and the amount of the toll so paid; all which sum or sums so paid shall be repaid to the owner or driver of such waggon, cart, or other carriage, upon his or their returning with such waggon, cart, or other carriage, so laden as aforesaid, and producing such ticket; and every collector of such toll

9. *Tolls.*

3 Geo. 4, c. 126.
same should be carried into or brought from an adjoining parish (a).

Tolls payable on waggons going empty for manure or road materials, &c., to be repaid when returning laden (b).

Penalty for not returning such tolls.

*(a) A local act exempted from toll carriages with manure for lands in the parishes where the roads were—a cart going with manure for lands in a parish not within the trust, was held still exempted under the above general clause. (*R. v. Adams*, 6 *M. & S.* 52.)

A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road or any of the highways in the parishes in which any part of the road lay, and, in a subsequent part, exempted generally carriages employed in conveying implements of husbandry or manure. In the following clause the trustees were empowered to compound with persons who resided in one parish, and occupied lands in an adjoining parish. The plaintiff's waggon was passing on the road, laden with lime, from one parish to another, for the purpose of cultivating his farm, situate in the latter, neither of which were situate in any of those parishes through which the road passed:—Held, that this being an exemption in the first-named clause as to husbandry, was to be liberally construed, and that it was not restrained by the subsequent one, and that consequently the plaintiff was not liable to the payment of toll. (*Hickinbotham v. Perkins*, 8 *Taunt.* 795.)

Under an exemption from toll in an act of Parliament for carts carrying compost of any kind, or any thing whatever used in the manuring of land, the carriage of lime (which is not considered compost or composition) is not exempt, the words "or any thing whatever used in the manuring of land" being considered as only applying to the carriage of ploughs, harrows, and such like instruments. (*King v. Gough*, 2 *Chit. Rep.* 655.)

Lime was not within the exemption of the Turnpike Act, 31 Geo. III. (*Anon. Loft.* 324.)

(b) Before this enactment it was held, that an act exempting waggons loaded with manure from toll, exempted them if they were going empty to fetch manure. (*Harrison v. James*, 2 *Chit. Rep.* 547.) As this occasioned frequent evasions of tolls under pretence of going to fetch manure, the above enactment was passed, ordering the payment of toll to be repaid on the return of the cart when loaded with manure, &c.

And since the act was passed it has been held that a waggon loaded with manure and empty baskets which had contained market-garden produce and had passed through the gate the day before, is exempt from toll. (32 *L. J. M. C.* 44, *Richer v. Wiggins*.)

* Decisions as to carts carrying manure or materials for roads, &c.

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Geo. 4, c. 126.

refusing to give such ticket on receiving the toll, or refusing or neglecting to return the same toll upon the return of such waggon, cart, or other carriage so laden, and re-delivery of the "*manure exemption*," or "*road materials*" ticket, as the case may be, shall, for every such offence, forfeit and pay to the owner of such waggon, cart, or other carriage, a penalty of not more than 5*l.*, upon conviction thereof before one or more justice or justices of the peace for the county, riding, division, or place where such offence shall be committed, upon the oath of one or more credible witness or witnesses.

Implements or loading and unloading shall not cause the payment of toll from which the lading would otherwise be exempt.

Sect. 28. The owner or driver of any waggon, cart, or other carriage laden with manure for land, or materials for any turnpike road or highway, passing through any turnpike gate, or otherwise passing on or across any turnpike road, shall not be liable to pay any toll, nor shall any toll be demanded for such carriage so laden, or the cattle drawing the same, by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork, necessary for loading or unloading such manure or materials, being in or upon any such waggon, cart, or other carriage, in addition to such manure or materials, if the loading thereof is substantially manure for land, or materials for the repair of any turnpike road or highway as aforesaid; any thing in any act contained to the contrary thereof notwithstanding.

4 Geo. 4, c. 95. Carriages laden with dung not to be exempted from toll when charged by any local act.

By 4 Geo. 4, c. 95, s. 23, nothing in the said recited act [3 Geo. 4, c. 126] or this act contained shall extend, or be construed to extend, to exempt any waggon, wain, cart, or other carriage laden with dung, compost, or manure for manuring land, or any horse or other beast drawing the same, from any toll imposed in respect thereof by any local act or acts for making, repairing, and maintaining any particular roads, where in such act or acts, such dung, compost, or manure shall be specially made subject to toll throughout the whole of such roads, without any local, parochial, or partial exemption.

Lime.

As to the exemptions concerning lime, see *post*, p. 1240.

Exceptions from exemptions.

And see the exceptions from exemptions from tolls, *post*, p. 1240.

3 Geo. 4, c. 126. Post horses having passed through any gate may return toll-free before nine in the next morning (a).
* *Sic*.

Post Horses.—By 3 Geo. 4, c. 126, s. 29, all horses travelling (a) for hire under the post-horse duties acts (b), having passed through any turnpike gate erected to or * be erected on any turnpike road, drawing any carriage in respect of which any toll shall have been paid, on returning through the turnpike gate at which the toll shall have been paid, and the other gates (if any) cleared by such payment, either without such carriage, or drawing such carriage, the same being empty, and without a ticket denoting a fresh hiring, shall be permitted to repass toll free, although such horses or carriage shall not have passed through such turnpike gate on the same day (c); provided that such horses so travelling shall return before nine of the clock of the

Decisions as to post-horses, and as to toll upon horses or carriages, having passed through the gate on the same day.

(a) The exemption applies only to horses travelling and drawing carriages. As to the meaning of the phrase "used in travelling," see 44 Geo. 3, c. 98, sched. B. It has been decided, that a hiring for the purpose of riding from London to Richmond and back, and also a hiring for 14 days to go a journey, are hirings to travel; but that a hiring to go many miles into the country for pleasure, no place being fixed, or a hiring to take an airing, or to go 10 or 12 miles into the country and return in the evening, are not any of them a

hiring to travel. (*Ramsden v. Gibbs*, 1 B. & C. 319.) The exemption is limited to horses hired under the post-horse duties acts: and it has been held, that a duty is payable under those acts where a horse is hired to go a certain stage and back again within the day. (*Hanley v. Cubberley*, 15 East, 255.)

(b) The post-horse duties are now repealed and new duties on licences to let horses are granted, see "*Excise*."

(c) As to what is a day, see *antc*, p. 1157.

morning succeeding the day on which they first passed the turnpike gate at which the toll shall have been paid (a).

(a) The following decisions have taken place with reference to the exemption from toll upon the return of horses or carriages which have before passed through the gate on the same day. Every local act provides that a person who has paid a toll shall not be liable to a second on the same day; but the right to claim the exemption in general depends on the wording of the particular act. (*Loaring v. Stone*, 2 B. & C. 515.)

Where the toll was on the horses, but the exempting clause enacted, that, if any person should have paid the toll for passing, the same person, on producing the ticket, should be permitted to pass free with the same cattle or carriages; it was held, that the toll having been paid by the coachman on passing for horses drawing a stage-coach, a second toll could not be taken for the same horses re-passing, though with a different coach and coachman, but belonging to the same proprietor. (*Norris v. Poate*, 3 Bing. 41.)

A turnpike act imposed tolls, 1st, upon carriages drawn by horses; 2nd, upon horses not drawing; 3rd, upon oxen, &c., provided that all the persons having paid once for their carriages, horses, and cattle, returning the same day, with the same carriages, horses, and cattle, should pass toll free. A subsequent act recited, that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations, one of which was, that the former tolls should cease, and that, instead thereof, there should be paid a certain toll for every horse drawing a carriage. Four horses passed a toll-gate in the morning drawing a carriage, and re-passed the same gate in the evening, drawing a different carriage; and it was held, that, being the same horses, they were not liable to a second toll. (*Fearnley v. Morley*, 5 B. & C. 25.)

In another case, where the act imposed toll, 1st, upon every horse, &c., drawing any carriage; 2nd, upon every horse, &c., not drawing; and 3rd, upon every score of oxen, &c., provided that no collector should take from any person more than one toll for the same carriage, horses, beasts, or cattle, passing once and re-passing once, in the same day, through the same or any of the gates

on the roads, such person producing a ticket denoting that such toll had been paid on that day for such horses, beasts, or cattle. Where the same horses passed once in the same day, drawing different carriages belonging to the same person, it was held, that only one toll was payable. (*Jackson v. Curwen*, 5 B. & C. 31, S. C.)

A turnpike act imposed tolls, 1st, on horses drawing carriages; 2nd, on carriages fixed to waggons; 3rd, on horses not drawing; and 4th, on oxen, &c.; provided that every person having paid the toll, on producing a ticket denoting such payment, should be permitted to pass and re-pass once in the same day, the gates mentioned in such ticket, with the same horses, or other beasts, coach or other carriages, without being liable to any additional toll. Where the same horses passed and re-passed once in the same day, drawing different carriages belonging to the same person, it was held, that only one toll was payable. (*Chambers v. William*, 5 B. & C. 36.)

In *Niblett v. Pollow* (1 Bing. N. S. 81), two acts of parliament imposed certain tolls upon horses drawing a coach or waggon, and others upon horses not drawing, and there was a power given to distrain any horse or any carriage upon which toll was imposed; and afterwards it was provided, that no person should be obliged to pay more than once in one day, in respect of any carriage or any horse, nor in respect of any carriage or horse employed for certain purposes, and that toll should not be taken from any person for the same horses at more than one toll-gate in one day; it was held, that the toll was imposed on the horses merely, and could not be taken upon a horse passing a gate twice on the same day, drawing different carriages.

Where a local turnpike act imposed a toll on every carriage and on every horse passing through the gate, and exempted any person from paying more than once in a day for passing or re-passing with the same carriage or horse; this was held to exempt the traveller from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number. And another clause, which provided, that in all cases of carriages

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3 Geo. 4, c. 126.

Horses returning with a Carriage.—Sect. 30. Where any horse or horses shall pass through any turnpike gate on any road, not drawing

travelling for hire, the traveller or passenger therein should be considered as the person paying the toll, and that such payment should not exempt such carriages re-passing with a different traveller or passenger; it was adjudged not to extend to stage-coaches, the carriage itself not being there hired by the respective passengers, but simply the vehicle of their conveyance; and therefore that such stage-coaches were free of toll under the former clause by one payment in the day, although returning with different passengers and different horses, the horses being the same in number. (*Williams v. Sangar*, 10 East, 66.)

And, in another case, where, by a local turnpike act (stat. 2, Geo. 3, c. lxvii.), a toll was imposed upon carriages, and not on the horses drawing them; with a provision that no person having paid such tolls, and producing a ticket, &c., should be again liable on the same day; and, by a subsequent act, reciting the former one, the tolls were repealed, and other tolls were imposed in respect of the horses drawing and not the carriages; but continuing all the former provisions, &c., of the former act:—Held, that no fresh toll was demandable on the same horses returning the same day, although drawing a different carriage. (*Gray v. Shilling*, 2 B. & B. 30.)

And where the act imposed a toll, first, upon every carriage drawn by horses, then upon every horse not drawing, and then upon every drove of oxen or cattle, with a proviso, “that no more than one toll should be taken from any person re-passing on the same day with the same horses, cattle, beasts, and carriages,” a stage-coach, drawn by four horses, paid the toll in the morning, and in the evening of the same day re-passed with the same driver, but with different horses and passengers; it was held, that a second toll was not payable. (*Waterhouse v. Keen*, 4 B. & C. 200.)

A local turnpike act imposed tolls for every horse drawing any coach, and other tolls upon every horse not drawing; it provided, generally, that, if the tolls had in any one day been paid for the passing of any horse, such horse should on that day be permitted to re-pass once toll free; but enacted, that the tolls for horses

drawing any stage-coach should be payable every time of passing. The trustees let the tolls, with power to collect them according to the act, and subject to such rules and restrictions as should be made by the trustees; and the lessee covenanted with the trustees to permit the owners of stage-coaches, waggons, &c., to pass in the following manner; viz. horses drawing any such carriage as thereinbefore mentioned, to be respectively allowed to pass along the road on payment of full toll going, and quarter toll returning, at any time during the same day. Horses passed through a gate, drawing a stage-coach, and full toll was paid for them: they returned the same day, drawing another stage-coach, and the lessee exacted full toll:—Held, that the lessee ought, by his covenant, to have demanded quarter toll only. (*Fenton v. Swallow*, 1 A. & E. 723.)

But where a turnpike act imposed a scale of tolls upon horses only, drawing or not drawing carriages respectively, as the case might be, and by a clause of exemption it was provided, that no person should be liable to pay toll more than once for passing and re-passing the gates on the same trust, at any time in any one day, with the same horses and carriages through the same toll-gate, but that every person having paid toll once should afterwards pass and re-pass with the same horses and carriages toll free, during the same day, through the same gate where such toll was paid; a stage-coach drawn by four horses having passed through a gate on the trust and paid the toll in the morning, and in the evening of the same day the same horses, drawing a different coach, of the same name, belonging to the same proprietors, driven by the same coachman, but carrying different passengers and parcels for hire, attempted to re-pass through the gate, and a second toll was demanded and refused, and the collector seized one of the horses until it was paid:—Held, in trespass for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempt from a second toll (*Loaring v. Stone*, 2 B. & C. 515.) The ground of this decision seems to have been, that the word “carriage” could have had no operation whatever, unless the second

any carriage, and a toll shall be paid on such horse or horses at such turnpike gate, and the same horse or horses shall return drawing any carriage on the same day (a), or within 8 hours after their first passing through such gate, the toll paid on such horse or horses on their originally passing shall be deducted from the toll payable on the same when drawing the carriage to which they shall be attached on their return, so that no higher toll shall in the whole be taken than if such horse or horses had, in the first place, passed through such turnpike gate drawing the said carriage (b).

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3 Geo. 4, c. 126.

Where a person who had passed through a turnpike gate without paying toll, under a claim of right *bonâ fide* made, was convicted in a penalty of 10*l.*, which the quarter sessions quashed upon appeal, Lord Denman, C. J., refused to disturb that decision, and Erle, J., held that it was right; but Patteson, J., and Coleridge, J., held that he was rightly convicted under the 133rd section of the 3 Geo. 4, c. 126. (*R. v. Irving*, 12 Q. B. 429.) A conviction under 4 Geo. 4, c. 95, s. 30, stated that a collector "did demand and take" from J. S. at a gate on a turnpike road "a certain toll, to wit, the toll or sum of 4*d.*, as and for a toll then and there payable by the said J. S. at such gate for a certain horse then and there drawing a certain cart upon two wheels only, and which said cart was then and there drawn by such one horse only, and driven by him, the said J. S., in, along, and over the said turnpike road, and for which said horse, drawing such cart, a certain toll, to wit, the sum of 6*d.*, was then and there payable by the said J. S. The said toll or sum of 4*d.*, so demanded and taken by the said collector as aforesaid, then and there being a less toll than he was then and there authorised to take for the causes aforesaid by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners of the said turnpike road, made in pursuance thereof, contrary to the form of the statute," &c. : Held a sufficient conviction, though no provisions of any particular turnpike act, or order or resolutions of trustees or commissioners, were set forth or referred to. A warrant of commitment on this conviction, for want of sufficient distress, stated that the collector was convicted, for that "he did suffer

Evading toll.

toll was due. But this does not distinguish it in a satisfactory way from *Jackson v. Curwen*, *supra*; and Mr. *Wellbeloved* and Mr. *Woolrych*, in their treatise on *Highways*, have expressed opinions that the two cases cannot be reconciled.

A turnpike act contained a clause, that, if any person should upon any day have paid the toll thereby authorised to be taken for the passing of any horse, cattle, beast, or carriage, through any one of the toll-gates or turnpikes erected under the act, such horse, &c., should, upon the production of a ticket, &c., be permitted to pass through any of the said turnpikes during the same day, without payment of any further toll; but, by a proviso, all horses drawing any stage-coach, diligence, van, caravan, or stage-waggon or other stage carriage, conveying passengers or goods for pay, were exempted from the above clause. R. was a wharfinger and agent to a company, who were carriers of goods by canal. R. kept waggons

and horses, which he employed in carrying out goods brought by the company to his wharf, situate at S., for persons in the neighbourhood, and bringing goods from the neighbourhood to his wharf, for transit by the canal. For such his conveyance of goods he made charges on each parcel. His waggons were so employed in carrying goods to and from persons residing at or near a place called L., or places intermediate between that and S., almost every day except Sundays. The waggons went out and returned at different hours, according to circumstances; on some days they made more journeys than on others; and they seldom omitted going altogether. R. had no office or receiving-house at L.:—Held, that R.'s waggons were not stage-waggons or carriages within the terms of the proviso, and therefore were not excluded from the above clause. (*R. v. Ruscoe*, 8 *Ad. & E.* 386.)

(a) See note (c), p. 1230.

(b) See note (a), p. 1231.

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and permit J. S. to pass through" the turnpike gate, "with a cart drawn by one horse, on payment of the sum of 4*d.*, as toll for the said cart drawn by one horse, the legal toll due and payable in respect of the said cart drawn by one horse being the sum of 6*d.*, contrary to the statute, &c. *Seemle*, that the warrant gave sufficient description of the offence under the statute; but held, that, supposing it insufficient, the conviction would cure the defect. (*Stamp v. Sweetland*, 8 Q. B. 13.) A conviction under 3 Geo. 4, c. 126, for evading tolls, was held sufficient; the adjudication being "that A. B. hath forfeited for the said offence the sum of 2*l.* 2*s.*," the payment of the penalty not being adjudged. (*Barnes v. White*, 1 C. B. 192.) A demand of the penalty is not necessary previous to the issuing of a distress warrant. (*Ib.*)

1 & 2 Will. 4, c. 95.
Cattle going to
pasture, or to be
shod, &c., exempt
from toll.

Cattle or Horses going to Pasture, or to be shod, &c.—By 1 & 2 Will. 4, c. 25, it is enacted that no toll shall be demanded or taken for or in respect of any horse, ass, sheep, swine, or other beast or cattle of any kind going to or from water or pasture (a), or to or from being shod or farried, and passing on any turnpike road, provided that such horse, ass, sheep, swine, or other beast or cattle of any kind do not pass upon such turnpike road more than the space of 2 miles, going to or returning from water or pasture, or to or from being shod or farried.

The exemption from toll on a turnpike road contained in this section in respect of sheep, &c., going to pasture, is not confined to farmers occupying farms in the neighbourhood of a toll gate. (*Warmby v. Deakin*, 32 L. J. M. C. 201.)

By the 2nd section of this act, toll was not to be taken for any horse, cart, &c. employed in the performance of statute labour. Statute labour is now abolished.

Act not to preju-
dice former acts.

Sect. 3. All and every the powers, provisions, authorities, penalties, and forfeitures contained in the said recited act, and in the several other acts for regulating turnpike roads in England, (save and except such parts thereof as are varied, altered, or repealed,) shall be as good, valid, and effectual for carrying this act into execution as if the same had been repeated and re-enacted in the body of this act, and that the said recited act and this act shall be construed together as one act.

Act not to extend
to gates near
London.

Sect. 4. The provisions of this act shall not be applicable to any turnpike gate or bar, or to any cattle passing through the same, unless the said gate or bar shall be situate more than 6 miles from London Bridge.

Officers and sol-
diers exempt from
toll.

Officers and Soldiers exempt from Toll.—The Annual Mutiny Act and Royal Marines on Shore Acts contain a clause as follows:—"All her Majesty's officers and soldiers, being in proper staff or regimental or military uniform, dress or undress, and their horses (but not when passing in any hired or private vehicle), and all recruits marching by route, and all prisoners under escort, and all enrolled pensioners in uniform when called out for training or in aid of the civil power, and all carriages and horses belonging to her Majesty, or employed in her service, under the provisions of this act, (*post*, "*Military Law*,"") when conveying persons or baggage, or returning therefrom, shall be exempted from payment of any duties and tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing place, or passing turnpike roads or bridges, otherwise demandable by virtue of any act already passed or hereafter to be passed.

By the 24 & 25 Vict. c. 126, after reciting that doubts have arisen

(a) A horse ridden to fetch the cattle from pasture would not, it seems, be exempt. (See *Harrison v. Brough*, 6 T. R. 706.)

how far the exemption from tolls granted to officers and soldiers by the 3 Geo. 4, c. 126, and the Mutiny Acts, enacts :

Sect. 1. No dues, duties, pontage, or toll from which officers and soldiers on their march or duty, or the horses of any officer or soldier on march or on duty, are exempted by the provisions of the recited or any other acts, shall be demanded or taken at any pier, wharf, quay, or landing place, or at any turnpike or other gate, bar, or bridge, for any volunteer officer or soldier, or for any horse or other beast used or ridden by any volunteer officer or soldier on his march or on duty, or going to or returning from any place appointed for and on the days for exercise, inspection, or review, or on other public duty, such volunteer officer or soldier being in the uniform of his corps, or for any cart, waggon, or carriage whatsoever, whether public or private, or for any horse or other beast drawing the same, employed only in carrying or conveying, or returning empty from carrying or conveying, having been employed only in carrying or conveying, any such volunteer officer or soldier on his march or on duty, or going to or returning from any place appointed for and on the days for exercise, inspection, or review, or other public duty, and being in the uniform of his corps, or the arms or baggage of any such volunteer officer or soldier, or any ordnance or barrack or commissariat stores belonging to or for the use of her Majesty's volunteer forces ; provided that nothing herein contained shall exempt any boats, barges, or other vessels employed in conveying the said persons, horses or other beasts, carts, waggons, carriages, arms, baggage, or stores along any canal from payment of tolls in like manner as other boats, barges, or vessels are liable thereto, or prevent toll being taken for conveying the said persons, horses or other beasts, carts, waggons, or carriages, arms, baggage, or stores, upon any railway.

Sect. 2. Any toll collector or other person who shall take, demand, or receive any dues, duties, pontage, or toll for or in respect of any volunteer officer or soldier, horse or other beast, carriage, waggon, or cart, entitled to exemption under this act, shall forfeit and pay for every offence a sum not exceeding 5*l*.

Sect. 3. Any person who shall falsely and fraudulently personate or represent himself to be a volunteer officer or soldier with the intent to evade payment of any dues, duties, pontage, or toll to which he would otherwise be liable, shall forfeit and pay for every offence a sum not exceeding 5*l*.

Sect. 4. All penalties, forfeitures, and fines by this act inflicted or authorised to be imposed shall be levied and recovered and applied in England and Scotland respectively in manner severally directed by the said recited acts, or any act or acts respectively amending the same for the time being in force.

The same with Horses, &c., in Service of Police.—By 2 & 3 Vict. c. 47, s. 10, no toll shall be demanded or taken on any turnpike road or bridge for any horse or police van passing along such road or bridge in the service of the metropolitan police ; provided that the rider of such horse or driver of such van shall have his dress and accoutrements according to the regulations of the police force at the time of claiming the exemption ; and every person who shall fraudulently claim or take the benefit of the exemption from toll herein contained, not being lawfully entitled thereunto, shall for every such offence be liable to a penalty not more than 5*l*. ; and in all such cases the proof of exemption shall be upon the person claiming the same.

By 3 & 4 Vict. c. 88, s. 1, after reciting that an act was passed in the last session of Parliament, intituled, "An Act for the establishment for county and district constables by the authority of justices of the peace ;" and it is expedient to make an additional provision for facilitating the execution thereof, and otherwise to amend the same, it is enacted, that no toll shall be demanded or taken on any turnpike

9. *Tolls.*

24 & 25 Vict. c. 126.

Horses and carriages, &c., of volunteers exempted.

Penalty for demanding tolls from volunteers, &c.

Penalty for personating volunteers, &c.

Recovery and application of penalties.

2 & 3 Vict. c. 47. The same with horses, &c. in service of metropolitan police.

3 & 4 Vict. c. 88.

9. *Tolls.*

3 & 4 Vict. c. 88.

road or bridge for any horse or police van, carriage, or cart, passing along such road or bridge, in the service of the police established under the provisions of the said act; provided that the constable (a) in charge of such horse, van, carriage, or cart, if not the chief constable, shall produce an order in writing under the hand of the chief constable, or shall have his dress according to the regulations of the police force at the time of claiming the exemption; and every person who shall fraudulently claim or take the benefit of the exemption from toll herein contained, not being lawfully entitled thereunto, shall for every such offence be liable to a penalty not more than 5*l.*; and in all such cases the proof of exemption shall be upon the person claiming the same. (See *post*, p. 1240.)

Proprietary roads and bridges which the public have the right to use on paying toll are turnpike roads and bridges within this act, and constables passing over them are exempt from toll. (*Longland v. Andrews*, 34 *L. J. Ex.* 90.)

Exemptions from extra toll for overweight.

3 Geo. 4, c. 126.

Exemptions from tolls:—

Horses and carriages attending his majesty, &c.

* *Sic.*

or conveying materials for roads and bridges (d);

or manure (except lime);

Overweight, &c.—As to the exemptions from extra toll for overweight or breadth of wheels, see *ante*, p. 1223.

Other Exemptions.—By the stat. 3 Geo. 4, c. 126, s. 32, no toll shall be demanded (b) or taken by virtue of this or any other act or acts of Parliament, on any turnpike road, for any horses or carriages attending his Majesty or any of the royal family, or returning therefrom* (c); or of or from any person or persons, for any horse or horses or other beast or cattle, or for any waggon, wain, cart, or other carriage [by 4 Geo. 4, c. 95, s. 10, *post*, p. 1241, the wheels must, to entitle a person to the exemption, be 4½ inches wide], employed in carrying or conveying, or going empty to fetch, carry, or convey, or returning empty from carrying or conveying, having been employed only in carrying or conveying, on the same day, any stones, bricks, timber, wood, gravel, or other materials for making or repairing any turnpike road or public highway, or for building, rebuilding, or repairing any present or any future bridge or bridges (e) on any such road or public highway, or of or from the surveyor of any turnpike road when engaged in executing or proceeding to execute, within the limits of his own or any adjoining trust (f) the powers of this or any other act or acts of Parliament for repairing, maintaining, or relating to any turnpike road; or for any horse, beast, or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying, on the same day, any dung, soil, compost, or manure (save and except lime) (g) for improving lands, or any ploughs, harrows, or implements of husbandry (h); (unless laden also with some other thing not

(a) By 14 & 15 Vict. c. 38, s. 4, the word “constable” in this section is to include superintending constable appointed under 13 & 14 Vict. c. 20.

(b) As to what is a demand of toll, see *Maurice v. Marsden*, 19 *L. J. C. P.* 152; *Stamp v. Sweetland*, 8 *Q. B.* 13.

(c) By 4 Geo. 4, c. 95, s. 24, “No toll shall be demanded or taken by virtue of the said recited act [3 Geo. 4, c. 126,], or this act, or any other act or acts for making or maintaining turnpike roads, for any horses or carriages attending, or going to attend, or returning from having attended his Majesty, or any of the royal family; anything in any act or acts to the contrary notwithstanding.” The queen’s carriages, drawn by her horses, and used by her permission by the wife of

one of the equerries for her own pleasure, are exempt from toll. (*Westover v. Perkins*, 28 *L. J. M. C.* 227.)

(d) See *ante*, p. 1228; and see *post*, p. 1240.

(e) This is an extension of the 13 Geo. 3, c. 84, s. 60; upon which it was held, that a bridge was not a public highway within a similar clause. (*Osmond v. Widdicombe*, 2 *B. & Ald.* 49.)

(f) The 3 Geo. 4, c. 126, extended the limits of the exemption to the adjoining trust, but that enactment is repealed.

(g) Unless specially liable under the local act. (See 4 Geo. 4, c. 95, s. 23, *ante*, p. 1230. See as to lime, *post*, p. 1240.)

(h) The 14 & 15 Vict. c. 38, s. 4, declares that “implements of hus-

hereby exempted from toll); [see this provision as to manure, &c., amended and explained by the 5 & 6 Will. 4, c. 18, and other acts, *ante*, p. 1228]; or any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or grown in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes, or other agricultural produce, and which has not been bought, sold, or disposed of (*a*), nor is going to be sold or disposed of; or for any horses or other beasts employed in husbandry going to or returning from plough or harrow, or to or from pasture or watering place (*b*), or going to be or returning from being shod or farried, such horses or other beasts not going or returning on those occasions more than 2 miles on the turnpike road on which the exemption shall be claimed [see the 1 & 2 Will. 4, c. 25, *ante*, p. 1234, explaining and embodying this provision]; or of or from any person or persons going to or returning from his, her, or their proper parochial church or chapel, or of or from any other person or persons going to or returning from his, her, or their usual place of religious worship tolerated by law, on Sundays, or on any day on which divine service is by authority ordered to be celebrated (*c*); or of or from any inhabitant of any parish, township, or place, going to or returning from attending the funeral of any person who shall die and be buried in the parish, township, or hamlet in which any turnpike road shall lie; or from any rector, vicar, or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish (*c*); or for horses, carts, or waggons employed only in carrying

9. Tolls.

3 Geo. 4, c. 126.
or agricultural
produce not sold
or for sale;

or for horses employed in husbandry, &c. (*b*);

or for going to or returning from church (*c*);

or for attending funerals;

or from ministers attending their duty;

bandry," in 3 Geo. 4, c. 126, s. 36, shall include threshing machines; but as these words do not occur in s. 36, no doubt s. 32 was meant by the legislature; this error is corrected by 16 & 17 Vict. c. 135, s. 6. A steam-engine employed only for working a threshing-machine, although it could be used for other purposes, is an implement of husbandry within the 14 & 15 Vict. c. 38, s. 4, and 3 Geo. 4, c. 126, s. 32. (*Reg. v. Matty*, 27 L. J. M. C. 59.)

(*a*) These exemptions in favour of agriculture are to be beneficially construed. *Hickinbotham v. Perkins*, 8 Taunt. 795; *ante*, p. 1229, n. (*a*). Barley grown on a farm whilst being conveyed to a mill to be ground into meal for pigs on the farm, and barley meal ground at the mill from barley grown on the farm whilst being conveyed back to be consumed by pigs on the farm, are within the exemption of "fodder for cattle." (*Clements v. Smith*, 30 L. J. M. C. 16.)

(*b*) In a local turnpike act, "cattle going to or returning from pasture," and "horses attending cattle returning from pasture," were exempted. It was held by the court, that a horse ridden by the owner of the cattle at pasture, in order to fetch them from pasture, did not come within either of the exceptions. (*Harrison v. Brough*, 6 T. R. 706.)

(*c*) A clergyman acting as the curate of a parish with the consent of the

bishop, though without his licence, is exempt from toll, and the exemption is not confined to turnpike roads within the parish to which he was going on parochial duty. (*Temple v. Dickinson*, 28 L. J. M. C. 10.) But where the curate of a parish was engaged by the rector of a neighbouring parish to perform his duty during a temporary absence from illness, such engagement not being under the licence of the bishop or any other authority, nor in fact communicated to him, and in the performance of such his engagement the curate rode from his parish into the rector's parish to perform a marriage at the parish church; on his way there he came to a turnpike gate within the rector's parish, at which the respondent, the toll collector, demanded a toll; exemption was claimed, and the curate paid the toll but summoned the collector before the justices, who dismissed the summons. The court held, that the appellant could not be said to have been a curate within the meaning of this section at the time he passed through the gate, and therefore that he was not within the exemption, because he was not in the exercise of his parochial duty as a curate within his parish; the intention of the act being to exempt any rector, vicar, or curate actually performing parochial duty within his parish. (*Brunskill v. Watson*, 3 L. R. 418.)

9. *Tolls.*

3 Geo. 4, c. 126.

or for conveying
vagrants;

or prisoners;

or for conveying
the mails;or for horses of
officers or soldiers
on duty;or for conveying
baggage or any
sick, ordnance, or
public stores;or for horses and
carriages used by
corps of yeomanry,
&c.;or for conveying
persons to or from
county elections;or for crossing
roads, or not pass-
ing above 100
yards thereon.

or conveying any vagrant sent by a legal pass; or any prisoner sent by any legal warrant, or returning empty after having been so employed; or for any horses or carriages, of whatever description, employed or to be employed in conveying the mails of letters and expresses under the authority of his Majesty's postmaster-general, either when employed in conveying, fetching, or guarding such mails or expresses, or in returning back from conveying or guarding the same; or for the horse or horses of any officers or soldiers on their march or on duty; or for any horse or horses or other beast, or any cart, carriage, or waggon employed in carrying or conveying, or returning empty from carrying or conveying, having been employed only in carrying or conveying the arms or baggage of any such officers or soldiers, or employed in carrying or conveying, or returning empty from having been employed only in carrying or conveying any sick, wounded, or disabled officers or soldiers; or for any waggon, wain, cart, or other carriage whatsoever, or the horse or horses or other cattle drawing the same, employed in conveying any ordnance, or barrack, or commissariat, or other public stores of or belonging to his Majesty, or for the use of his Majesty's forces, or returning empty from having been so employed (a); or for any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person shall be dressed in the uniform of his corps, and shall have his arms, furniture, and accoutrements, according to the regulations of such corps, at the time of claiming the exemption; (b) or for any horses or carriages carrying or conveying any person or persons to or from any election or elections of a knight or knights of the shire to serve in Parliament for the county or counties in which such turnpike road shall be situated; or for any horses or carriages which shall only cross any turnpike road; or shall not pass above 100 yards thereon. (c)

(a) In the case of *London and South-Western Railway v. Reeves*, L. R. 1 C. P. 580, the respondent, a toll-gate keeper, took the toll for a waggon and horses conveying hay to the Commissariat Stores at Aldershot for the use of her Majesty's forces; the hay had been delivered to the appellants by certain contractors to be conveyed by them in pursuance of a contract made with the Deputy Commissary General. By the term of the contract there was a right to reject any part of the goods supplied if of inferior quality. The justices having decided that the toll had been properly demanded, the court of Common Pleas held it to be clear that the power to refuse any part of the stores that might be of inferior quality did not prevent them being the property of her Majesty, and that, as the contractor might hire any one he liked to convey the stores to the place where they were to be delivered, the toll had been wrongly demanded, and gave judgment for the appellants. This case was affirmed in *Toomer v.*

Reeves, L. R. 3 C. P. 62, where the facts were identical, except that the waggon in respect of which the toll was demanded was the property of the contractor.

(b) This clause extends to a carriage used by any member of a corps of volunteer infantry for his own conveyance to or from the place of exercise. *Stephenson v. Taylor*, 30 L. J. M. C. 145; *Trunstal v. Lloyd*, E. B. & S. 95; and also to an omnibus used for the same purpose, although all the volunteers may not be in uniform (ib.). But a yeomanry non-commissioned officer driving in uniform to the place of exercise is not exempt from toll, though by 3 Geo. 4, c. 136, s. 32, he is exempt if riding to such place; and the 26 & 27 Vict. c. 65, s. 45, which gives the widest exemptions in favour of volunteers, does not apply to yeomanry. (*Humphrey v. Bethel*, L. R. 1 C. P. 216.)

(c) The 100 yards must be on the identical road with that on which the toll-gate is erected, and it is not sufficient that the distance should be

By 4 & 5 Vict. c. 33, s. 1, it was enacted, that no toll shall be demanded or taken for or in respect of any horse, ass, sheep, swine, or other beast or cattle, of any kind whatsoever, or of any waggon, cart, vehicle, or other carriage, of any kind whatsoever, which shall only cross any turnpike road, or shall not pass above 100 yards thereon (a).

Under this section a person is liable to pay at a toll gate though he may not have traversed 100 yards on the road before coming to the gate, if after passing through he uses the road for a distance, which together with the space traversed before reaching the toll gate, exceeds the distance of 100 yards. (*Horwood v. Powell*, 30 L. J. M. C. 203.)

But the 100 yards means upon one journey, therefore 2 or more journeys cannot be coupled together so as to make more than 100 yards. (*Veitch v. Exeter Road Trustees*, 27 L. J. M. C. 116.)

Sect. 2. That all and every the powers, provisions, authorities, penalties, and forfeitures contained in the said recited act, and in the several other acts for regulating turnpike roads in England, save and except such parts thereof as are varied, altered, or repealed, shall be as good, valid, and effectual for carrying this act into execution, as if the same had been repeated and re-enacted in the body of this act, and that the said recited act and this act shall be construed together as one act.

Sect. 3. Provided that nothing in this act contained shall extend or be construed to extend to or affect any road or roads in the said recited act mentioned to be exempted from the provisions thereof.

This act is merely a declaratory one, and does not create any new exemptions from toll. (*Harris v. Morrice*, 10 M. & W. 260.) In an action of debt by the trustee of a turnpike road against a lessee of tolls, the defendant pleaded, that, after the time of the demise to him, and before any rent became due, the above statute was passed, which took away certain of the tolls, and therefore the lease was void. Held bad on general demurrer. (*Id.*)

By 3 Geo. 4, c. 126, s. 33, so much of this act (see *ante*, p. 1237) as directs that no toll shall be demanded or taken from any person or persons going to or returning from his, her, or their proper parochial church or chapel, or of or from any other person or persons going to or

9. Tolls.

4 & 5 Vict. c. 33.
To what horses,
carriages, &c.,
this part of enact-
ment to extend to.

3 Geo. 4, c. 126.
Exemption from
toll on Sundays,
&c., for persons
going to and from

travelled upon another turnpike-road under the management of the same trustees. (*Reg. v. Gerrard*, 26 L. J. M. C. 148; and see *Veitch v. Exeter Turnpike Road*, 27 L. J. M. C. 116, *supra*.)

(a) The court decided the exemption in the 13 Geo. 3, c. 84, s. 34, as to carriages passing for a less distance than one hundred yards on the road, to extend to cases where the carriages quitted the road on the opposite side to that on which they entered it, as well as on the same side. (*Major v. Oxenham*, 5 Taunt. 340.) As to when the exemption is confined to carriages crossing the road, see *Phillips v. Harper* (2 Chitty's R. 412).

Where certain roads were, by local acts, placed under the direction of trustees for amending, improving, and repairing the same, and the trustees were empowered to erect turnpike gates on the said roads, and re-

ceive tolls there; but there was a certain portion of one of the said roads, which they were prohibited from repairing or improving, and on which they were not to erect toll-gates:—Held, that a person travelling along the last-mentioned road for more than 100 yards including the excepted part, but less if that part were excluded, was not exempted from toll by 3 Geo. 4, c. 126, s. 32. (*Pope v. Langworthy*, 5 B. & Adol. 464.)

Where tolls are payable by persons passing along a turnpike road, and an act of parliament exempts and prohibits the trustees of such road from repairing a certain portion of it, and imposes the liability on others, but is silent on the subject of tolls, such portion still continues, for the purposes of toll, to be part of the turnpike road. (*Phipson v. Harvett*, 1 C. M. & R. 473.)

Decisions as to
when passengers
liable to toll for
passing along
parts of road.

9. *Tolls.*

3 Geo. 4, c. 126.
church not to extend within five miles of London, &c.

returning from his, her, or their usual place of religious worship tolerated by law, on Sundays, or on any day on which divine service is ordered by authority to be celebrated, shall not extend, or be construed to extend, so as to exempt any such person or persons from the payment of toll, at any turnpike gate or gates situate within the distance of 5 miles of the Royal Exchange in the city of London, or within the distance of 5 miles of Westminster Hall in the city and liberties of Westminster.

4 Geo. 4, c. 16.
Carriages, &c., laden with lime when exempted from toll by local act, not liable to toll.

*Carriages, &c., laden with Lime exempted from Toll by Local Act (a).—*By 4 Geo. 4, c. 16, s. 1, it is enacted, that nothing in the said act shall extend or be construed to extend to enable any collector or collectors of tolls authorised to be taken under any local act or acts of parliament, for horses or carriages employed in carrying or conveying lime for the improvement of land, to take or demand any toll for lime as aforesaid, other than such as might have been demanded and taken under the authority of any such local act, previous to the passing of the said recited act of the last session of parliament; anything in the said act to the contrary notwithstanding.

By section 2 of the above act (4 Geo. 4, c. 16), in all cases where any lease or contract shall have been made since the passing of the said recited act, by any trustees of any turnpike road or roads to or with any collector or collectors of tolls, for letting to farm any tolls to be received or taken upon any such road or roads whereon a toll on lime for improving land was payable or considered to be payable under the said recited act at the time of making or entering into any such lease or contract, it shall and may be lawful to and for the said trustees to make such fair and reasonable abatement in the rent payable by such collector or collectors, during the unexpired residue of such lease or contract as aforesaid, as shall be agreed upon by and between the said trustees and such collector or collectors as aforesaid, or such lease or contract shall, at the expiration of one calendar month after the passing of this act, either become absolutely void, upon payment, but not otherwise, by such collector or collectors, or by his, her, or their heirs, executors, or administrators, of all rent and arrears of rent, or sum or sums of money which shall be due and payable by him, her or them, at and up to the end of the said calendar month.

3 & 4 Vict. c. 51.

And by the 3 & 4 Vict. c. 51, after reciting the above act, it is enacted, that nothing in the said general turnpike act, 3 Will. 4, c. 83, shall extend or be construed to extend to enable any collector or collectors of tolls, under the authority of any local act or acts, to take or demand any toll for horses or carriages employed in carrying or conveying lime on any turnpike road for the improvement of land, when carriages or horses laden with lime for the improvement of land are exempted from the payment of toll by any such local act or acts, now in force, or which were exempted from the payment of toll by any local act or acts in force at the time of the passing of the said recited act, 3 Geo. 4, but since repealed.

4 Geo. 4, c. 95.
Exceptions from exemptions from tolls in certain cases, unless carriages with four and a half inch fellies are used.

Exceptions from Exemptions from Tolls.—By 4 Geo. 4, c. 95, s. 10, no person shall, by virtue of the said recited act [3 Geo. 4, c. 126], or this or any other act or acts of parliament, have, claim, or take the benefit or advantage of any exemption from toll or part of tolls, or penalties for overweight, or to pay less toll for or in respect of any waggon, wain, cart, or other carriage, or the horses or beasts drawing the same, and carrying any particular kind of goods, than other carriages of the like nature carrying other goods ought to pay, unless such waggon, wain, cart, or other carriage in respect of which the ex-

(a) See 5 & 6 Will. 4, c. 18, *ante*, p. 1228, and 13 & 14 Vict. c. 79, s. 3, *post*, p. 1243, as to the exemption of carriages conveying manure.

emption shall be claimed, shall have the sole of the bottom of the fellies of the wheels thereof of the breadth or gauge of four and a half inches or upwards (other than and except carts and carriages employed in carrying corn or grain in the straw, hay, straw, fodder, dung, or lime for the improvement of land, or other manure, or any plough, harrow, or implements of husbandry only), but that the tolls imposed by any act, together with the additional tolls required to be taken for or in respect of every such waggon, wain, cart, or other carriage, having the sole or bottom of the fellies of the wheels thereof of less breadth or gauge than four and a half inches as aforesaid, and for or in respect of horses or beasts of draught drawing the same, and the additional tolls or penalties for overweight (except as before excepted), shall be paid in the same manner, to all intents and purposes, as if no exemption or less toll had been enacted or allowed, and as fully as all other waggons, wains, carts, and carriages, and horses drawing the same, ought respectively to pay, which are not entitled to any exemption from toll in the whole or part, or to pay a less toll than other waggons, wains, carts, and carriages; any law or statute to the contrary notwithstanding. [See further as to tolls in respect of narrow wheels, *ante*, p. 1225.]

9. *Tolls.*

4 Geo. 4, c. 95.

Penalty for claiming, &c., Exemption.—By 3 Geo. 4, c. 126, s. 36, if any person or persons shall, by any fraudulent or collusive means whatsoever, claim or take the benefit of any exemption from toll or from overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this act contained, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l.*; and in all cases the proof of exemption shall be upon the person claiming the same.

3 Geo. 4, c. 126.
Penalty, not exceeding 5*l.*, on fraudulently taking the benefit of exemption.

By 9 Geo. 4, c. 77, s. 17, if any person or persons shall claim or take the benefit of any of the exemptions mentioned in any local turnpike act, not being entitled to the same, every such person shall, for every such offence, forfeit any sum not exceeding 5*l.*; and, in all cases, the proof of exemption shall be upon the person claiming the same.

9 Geo. 4, c. 77.
Taking exemption of local act.

When Exemption cannot be tried by Indictment.—The question of exemption from toll cannot be tried on an indictment against a turnpike-keeper for extortion in taking the toll; the general right to demand toll not having been denied, nor the ground of exemption notified at the time when the toll was taken. (*R. v. Hamlyn*, 4 *Camp.* 379.)

When exemption cannot be tried by indictment.

6. POWER TO REDUCE OR ADVANCE TOLLS.

The local act regulating the turnpike road, generally, contains a power for the trustees to reduce or advance the tolls.

By stat. 3 Geo. 4, c. 126, s. 43, it shall and may be lawful for the trustees or commissioners appointed in and by virtue of any act of parliament for the repairing and amending any turnpike roads, in case no power or effectual power should be given to them under the act by which they are appointed, and they are hereby empowered, at a meeting to be held for that purpose (of which one calendar month's notice shall be given in writing, to be affixed on all turnpike gates which shall be then erected upon such roads, and in some public newspaper circulated in that part of the country), from time to time to lessen and reduce (a) all or any of the tolls granted by any of the said respective acts, for and during such time as the said trustees or commissioners shall think proper; and afterwards, at any meeting to be held as aforesaid, from time to time, as they shall see occasion, to advance all or any of the tolls so lessened to any sum or sums of

3 Geo. 4, c. 126.
Trustees may reduce tolls;

and afterwards advance them.

(a) See form, No. 81, *post*.

9. *Tolls.*

3 Geo. 4, c. 126.

Reduction not to be made without consent of creditors in certain cases.

Reduction or advance of tolls to be made proportionably.

money not exceeding the several rates granted by such acts of parliament, and this act respectively: Provided, nevertheless, that where the whole money borrowed on the credit of the tolls granted by any such act shall not have been paid and discharged, no such tolls shall be lessened or reduced without the consent of the person or persons entitled to five-sixths of the money remaining due upon such respective tolls.

Sect. 44. In all cases where the trustees or commissioners of any turnpike road shall reduce or advance the tolls on the road or roads for which they shall act, such reduction or advance shall be made as to waggons, carts, and other carriages, the breadth of the wheels whereof is regulated by this act, with reference to the proportion or scale of tolls payable on such waggons, carts, or other carriages, according to the breadth of the wheels thereof; (that is to say), the trustees or commissioners making the reduction or advance shall reduce or advance the toll payable on waggons, carts, or other such carriages, having the fellies of the wheels thereof of the breadth of 6 inches, and shall then take and demand double or other proportions (as the case may be) of such reduced or advanced tolls on waggons, carts, or other carriages, having the fellies of the wheels thereof of a greater or less breadth than 6 inches; and the reduction or advance of the proportion of toll to be payable by this or any other act of parliament in respect of the breadth of wheels, or any other reduction or advance of tolls, to be made in any other way than in manner aforesaid, shall be null and void to all intents and purposes whatsoever.

2 & 3 Vict. c. 46.
Trustees may reduce tolls for overweight.

By the 2 & 3 Vict. c. 46, after reciting the 3 Geo. 4, c. 126, and the 4 Geo. 4, c. 95, it is enacted, that the trustees or commissioners of any turnpike road may and are hereby empowered, at any meeting or meetings to be held for the purpose (of which meeting or meetings and the purposes thereof, 14 days' notice shall be given), to lower the several additional tolls by the said recited acts or either of them directed to be taken for overweight, in such manner as to them shall seem fit and convenient, and from time to time to take such reduced tolls for overweight as shall be fixed and agreed on at such meeting or meetings.

By 4 Geo. 4, c. 95, s. 20, trustees or commissioners within 10 miles of London may reduce tolls for overweight.

By a turnpike act, the trustees were authorised to take at each and every of the several and respective turnpike gates erected on the road the following tolls: "For every horse, &c., drawing a carriage, 9*d.*; for every horse, &c., not drawing, 2*d.*; for every drove of oxen, &c., 1*s.* 6*d.* per score; for every drove of hogs, &c., 1*s.* 4*d.*" By another section it was made lawful for the trustees, at a meeting to be holden for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen and reduce, and again to raise and advance, all or any of the tolls thereby granted, and such tolls so reduced or advanced were to be collected as the tolls thereby granted: it was held, that, under this act, the trustees were authorised to reduce or advance any one of the four descriptions of tolls at all the gates, but not to reduce or advance them at one gate and not at another. (*R. v. Trustees of Bury and Stratton Roads*, 4 B. & C. 361.)

4 Geo. 4, c. 95.
Power for trustees in certain cases to reduce tolls, and fix their amount according to
4 Geo. 4, c. 95.

By 4 Geo. 4, c. 95, s. 7, in every case where the tolls authorised and empowered to be taken on any turnpike road, shall be in the hands of the trustees or commissioners of such road, and not leased or let to farm, but collected or on their account, the trustees or commissioners of such road shall, in case such tolls were increased by the provisions of the said recited act [3 Geo. 4, c. 126], within 14 days after the passing of this act, reduce the said tolls, and fix the amount thereof according to the provisions of this act; and in case the tolls collected and taken on any turnpike road shall be leased and let to farm, it shall and may be lawful for the trustees or commissioners of such road to

compound and agree with the farmer or lessee of the said tolls for reducing the same, and fixing the amount thereof according to the provisions of this act; and in each of the said cases the provisions of this act, with regard to tolls hereinbefore next mentioned, shall then commence and take effect at the time of such reduction, and shall not be postponed to the said 1st day of January, 1824.

By 13 & 14 Vict. c. 79, s. 3, it is enacted, that it shall be lawful for the trustees or commissioners of any turnpike road, in case it appear to them expedient so to do, and notwithstanding any provisions of any local act affecting such road, and without the consent of any person or persons entitled to money borrowed and remaining due on the credit of the tolls of such road, from time to time at any general annual or other meeting of such trustees or commissioners (of which meeting, and of the purposes thereof, so far as the same relate to the exercise of the powers given by this enactment, such trustees or commissioners shall cause notice to be given in some newspaper usually circulated in the county or counties in which such road is situate), to reduce or wholly take off the tolls on horses, beasts, cattle, and carriages employed in carrying or conveying lime on such road for the improvement of land, and afterwards at any such meeting (of which notice shall be given as aforesaid) from time to time, as they see occasion, to advance or reimpose the tolls so reduced or taken off, but so that such tolls shall not be advanced beyond the amount or amounts authorised to be taken by the act or acts of parliament granting such tolls: provided always, that no such order for reducing, taking off, advancing or reimposing such tolls shall take effect until the same has been submitted to and sanctioned by one of her Majesty's principal secretaries of state: provided also, that where the tolls of such road have been let to farm by the trustees or commissioners of such road, no such order reducing or taking off such tolls shall take effect until the expiration of the subsisting contract or agreement for the farming or letting thereof.

9. *Tolls.*

4 Geo. 4, c. 95.

13 & 14 Vict. c. 79. Tolls.

Power to trustees to reduce or take off tolls on lime used in agriculture.

7. COMPOSITION FOR TOLLS.

By stat. 4 Geo. 4, c. 95, s. 13, the trustees and commissioners of every turnpike road may, and they are hereby empowered, from time to time, as they shall see convenient, to compound and agree, for any term not exceeding one year at any one time, with any person or persons, for the tolls payable for any horses, cattle, or beasts, or carriages, passing through any of the turnpikes or toll gates of the road under their care and management, and collected and taken under the authority of the particular act or acts in execution of which the trustees or commissioners making such composition shall act, or of the said recited act [3 Geo. 4, c. 126] or this act.

4 Geo. 4, c. 95.

Composition may be made for tolls for one year.

8. TOLL HOUSES.

The property of these is vested in the trustees, and they may let or mortgage them; and a power is given them to repossess themselves in a summary way of these houses, where the lessee neglects to perform the terms of his agreement, &c. (See p. 1252.)

Property in.

If, however, a toll house becomes useless, it must be pulled down; for, by 4 Geo. 4, c. 95, s. 57, where any toll house or tollhouses, standing on or adjoining any turnpike road, and which shall have been erected by or vested in the trustees or commissioners of such road, shall become useless, and be no longer required for the purposes of such road, it shall not be lawful for the trustees or commissioners of such road to sell or dispose of such toll house or toll houses; but in every such case the trustees or commissioners of the road on which such toll house or toll houses no longer required shall stand, shall cause such toll house or toll houses with the outhouses attached or belonging thereto, to be pulled down, and the materials thereof to be sold or removed, and the site of such toll house or toll houses so pulled

Toll houses not wanted shall be pulled down, and the materials and site sold.

9. *Tolls.*

4 Geo. 4, c. 95.

down, together with the gardens and appurtenances thereunto belonging, may then be sold by the said trustees or commissioners, in the same manner as and under the regulations in the said recited act [3 Geo. 4, c. 126] and this act contained, with respect to any land or ground not wanted for the purposes of the road.

29 & 30 Vict. c. 105.

By 29 & 30 Vict. c. 105, s. 2, if the road would be improved by the addition thereto of the whole or any part of the site of the toll house, or of any garden or land belonging thereto, then the trustees or commissioners of the road shall, instead of selling the whole of such part (as the case may require), cause the same to be added to the road, and shall cause any building standing on the ground so added to be pulled down, and the materials thereof to be sold and removed.

Where the trustees or commissioners of a turnpike road are authorised to sell the site of a toll house, they may, notwithstanding anything contained in the last-mentioned act, sell the toll house and other buildings standing on such site, unless required to pull them down by the person to whom a right of pre-emption is given by any acts relating to turnpike roads, subject, as aforesaid, to the provisions of the said act relating to the selling of toll houses, shall be of the same force as if this act had not passed.

Letting of.

As to the letting of toll gates, see *post*, p. 1249.

Rating of.

See *ante*, p. 1188, as to toll houses, or any person in respect of the same, not being liable to be rated or assessed towards the payment of poor's rates, &c.

9. TOLL GATES, ERECTING AND LIGHTING, &c.

3 Geo. 4, c. 126.
Property in.

The property in the toll gates is vested in the trustees, by the 3 Geo. 4, c. 126, s. 60, *ante*, p. 1163.

9 Geo. 4, c. 77.
Power to continue
or erect toll
gates (*a*).

By 9 Geo. 4, c. 77, s. 5 (*a*), it shall be lawful for the trustees of any turnpike road, and they are hereby authorised and empowered, to continue all and every or any of the toll gates or toll houses now standing or being in, upon, or across any such turnpike road, or on the sides thereof, and, from time to time, at any special meeting to be holden for that purpose, of which meeting public notice, specifying the time and place and the purpose thereof, shall have been given in some newspaper published or circulated in the county or counties through which any such turnpike road passes, and also by affixing a copy of such notice on all the turnpikes, toll gates, or side bars (if any) which shall be then standing on such road, 14 days previously to such meeting, to order and direct, by some order in writing, to be signed by three at least of the trustees present at such meeting, that there be erected and built in, upon, or across any such turnpike road or any part thereof, or upon the sides thereof or any part thereof, when and where they shall judge necessary, such and so many toll gates, turnpikes, side bars and chains, with toll houses, outhouses, and other conveniences thereto (*b*), and also to take in and inclose on

(*a*) By the 3rd section of this act, so much of the 3 Geo. 4, c. 126, as directs that no toll gate shall be erected on the side of any turnpike road, unless the same be ordered by the trustees or commissioners at a public meeting, in manner therein mentioned, is repealed, and by the 4th section of the 9 Geo. 4, c. 77, so much of the 7 & 8 Geo. 4, c. 24, as directs that it shall be lawful for the trustees of any turnpike road, to order and direct any turnpikes, toll gates, or side bars to be removed as

therein directed, is repealed.

(*b*) Where a local act authorised the trustees to erect turnpikes, with suitable buildings and conveniences, it was held, that sinking a well was within the scope of their authority, and that a contract made by one of them on behalf of the rest was valid: and that an action on such contract to recover a moiety of the expense was well brought in the name of their clerk. A consent on the part of the trustees to a proposition, that, if the well was sunk on the waste land of

the sides of such road, or any part thereof, suitable garden spots for each of such toll houses, not exceeding one-eighth of a statute acre to each toll house, as the said trustees shall direct or appoint; and also shall and may from time to time at any such meeting, or at any other meeting to be called as aforesaid, and by such order as aforesaid, from time to time order and direct any of such toll gates, turnpikes, side bars, and chains to be taken down or discontinued, or to be removed and placed elsewhere, upon, across, or on the sides of such road, in such situations as to them the said trustees may appear fit or eligible: Provided that nothing in this act contained shall authorise any toll gate, turnpike, side bar, or chain to be erected or built in any place or places where it is or may be provided by any local turnpike act there shall be no turnpike, toll gate, side bar, or chain erected, built, or placed.

The power given to the trustees by this section to take land on the sides of the turnpike road is limited to the strips of open land left intervening between the turnpike road and the old enclosures, subject to an easement to the public, and therefore the trustees have no power to take for the erection of toll houses lands adjacent to the road over which the public has no easement, whether such lands be enclosed or not. (*Beckett v. Upton*, 5 E. & B. 635.)

As to the erecting weighing houses, see *ante*, p. 1224.

By 3 Geo. 4, c. 126, s. 46, if the trustees or commissioners appointed to put any act of parliament made for the repair of any turnpike road into execution shall exceed their power, by erecting or continuing any gate or gates, turnpike or turnpikes, where they have not any power, by virtue of any act of parliament, to erect such gate or gates, turnpike or turnpikes, it shall and may be lawful for the justices of the peace for the limit where any such gate or gates, turnpike or turnpikes, is or shall be erected or continued, in their general quarter session assembled, upon complaint of such excess of power in such trustees (a), in a summary way to hear and determine whether such power has been exceeded, and, if such power has been exceeded, to order the sheriff of the county, who is hereby authorised and required to execute such order, to remove any such gate or gates, turnpike or turnpikes.

By 7 & 8 Geo. 4, c. 24, s. 6, it shall be lawful for the trustees to order and direct one or more lamp or lamps to be placed and erected on or against or in front of each and every of the toll houses on the road, and also to order and direct at what times of the year, and during what hours, such lamp or lamps, or any of them, shall be kept lighted; and all and every the collector and collectors of the tolls on such road, and also all and every the lessees or lessee thereof, who

9. Tolls.

9 Geo. 4, c. 77.

Weighing houses.

3 Geo. 4, c. 126.
If trustees cause gates to be erected contrary to act of parliament, justices may order their removal.

7 & 8 Geo. 4, c. 24.
Lamps to be lighted at toll houses.

the defendant, he would pay half of the expense, was held also a sufficient consideration to support the action. (*Newman v. Fletcher*, 1 D. & R. 202).

(a) Toll gates ought not to be erected in the middle of great towns, so as to obstruct the necessary intercourse. (*Hammond v. Brewer*, 1 Burr. 377.)

As to the construction of the word "town" in turnpike and other acts, see *Reg. v. Fisher*, 8 C. & P. 612; *Elliott v. South Devon Railway*, 2 Ex. 725.

Where a turnpike act provided that it should not be lawful to continue or erect any turnpike gate across

the roads in the town of T., it was held that the prohibition extended to the erection of a gate within the limits of the town during the operation of the act, and that "town" was to be understood in the popular sense of a collection of houses; and the question was whether the spot where a turnpike gate was erected was so surrounded by houses that the inhabitants might fairly be said to dwell together, and that the fact of the houses being separated by gardens did not prevent them from lying together. (*R. v. Cotile*, 20 L. J. 162, M. C.)

9. *Tolls.*

7 & 8 Geo. 4, c. 24.

shall neglect or omit to observe and fulfil the order of the said trustees in respect to the keeping and lighting of such lamp or lamps, shall forfeit and pay any sum not exceeding 20s. for every such neglect or omission; and in case any person shall damage or injure any lamp or lamps to be placed and set up as aforesaid, or extinguish the lights therein, such person shall forfeit and pay any sum not exceeding 40s. for every such offence.

Injuries to.

As to wilful injuries to gates, bars, &c., see *post*, p. 1274.

10. TABLE OF TOLLS, TICKETS.

4 Geo. 4, c. 95.
Trustees to put
up table of tolls,
with names of
gates.

By 4 Geo. 4, c. 95, s. 28, the trustees and commissioners for making or maintaining any turnpike road shall, and they are hereby required to put up, or cause to be put up, and afterwards to be continued, at every toll gate within their respective districts, a table, painted in distinct and legible black letters, on a board with a white ground, containing at the top thereof the name of the gate at which the same shall be put up, and also a list of all the tolls payable at every such gate, distinguishing severally the total amount of tolls payable under any particular act or acts, and this and the said recited act, and the different sorts of carriages for which they are to be paid, where there shall be any variation therein, and also a list of the several gates which shall be wholly or partially cleared by the payment of toll at the toll gate or bar where such table of tolls shall be affixed; and the said trustees or commissioners shall also provide tickets denoting the payment of toll, and on such several tickets shall be specified the name of the gate at which the same respectively shall be delivered, and also the names of the several gates freed by such payment, one of which tickets shall be delivered gratis to the person paying the toll; and on the production of such ticket at any gate or gates therein mentioned, as being cleared as aforesaid by the payment of the toll at the gate where such ticket was delivered, the person producing the same shall pass through the gate or gates therein mentioned without paying any further or additional toll.

Tickets denoting
payment of tolls.

11. RECOVERY OF TOLLS, AND PENALTY FOR EVASION.

3 Geo. 4, c. 126.
For recovery of
tolls.

By 3 Geo. 4, c. 126, s. 39, if any person, subject or liable to the payment of any of the toll or tolls under and by virtue of this or any other act of Parliament, for making, repairing, or maintaining any turnpike road, shall, after demand thereof made, neglect or refuse to pay the same, or any part or parts thereof, it shall be lawful for the person or persons authorised or appointed to collect such tolls, by himself or themselves, or taking such assistance as he or they shall think necessary, to seize and distrain any horse, beast, cattle, carriage, or other thing, upon or in respect of which any such toll is imposed, together with their respective bridles, saddles, gears, harness, or accoutrements, (except the bridle or reins of any horse or other beast, separate from the horse or beast,) or any carriage in respect of the horses or cattle drawing the carriage on which such toll is imposed, or any of the goods or chattels of the person or persons so neglecting or refusing to pay; and if the toll, or any part thereof, so neglected or refused to be paid, and the reasonable charges of such seizure and distress shall not be paid within the space of four days next after such seizure and distress made, the person or persons so seizing and distraining may sell the horse, beast, cattle, carriages, or things so seized and distrained, or a sufficient part thereof, returning the overplus of the money to arise by such sale, (if any,) and what shall remain unsold, upon demand, to the owner thereof, after such tolls and the reasonable charges occasioned by such seizure, distress, and sale, shall be deducted (a).

Collector may
distrain.

If toll and charges
be not paid in four
days, distress may
be sold.

(a) As to a collector informally appointed recovering tolls, see *Peacock v. Harris*, 10 *East*, 104; *post*, p. 1250,

n. (b); *Maurice v. Marsden*, 19 *L. J. C. P.* 152.

Sect. 40. If any dispute shall happen or arise about the amount of the tolls due, or the charges of making, keeping, or selling any distress made for non-payment of any tolls, it shall be lawful for the collector, or the person distraining, to retain such distress, or the money arising from the sale thereof, (as the case may be,) until the amount of the tolls due and the charges of the making, keeping, and selling the distress be ascertained by some justice of the peace for the county, division, or place wherein the turnpike or toll gate at which the toll in dispute shall be payable, shall or may be situate, who, upon application made to him for that purpose, shall examine the matter on the oath of the parties or other witness or witnesses, (which oath such justice is hereby authorised and empowered to administer,) and shall determine the amount of the tolls due, and shall award such costs and charges to either party as to the said justice shall appear right and proper; all which costs and charges shall and may be levied and recovered, in case of non-payment thereof forthwith, by distress and sale of the goods and chattels of the person or persons so awarded or directed to pay the same, by warrant under the hand and seal of such justice, rendering the overplus, (if any,) upon demand, after deducting the costs and charges of making such distress and sale, to the person or persons whose goods and chattels shall have been so distrained and sold.

Sect. 41. If any person shall, with any horse, cattle, beast, or carriage, go off or pass from any turnpike road, through or over any land or ground near or adjoining thereto, (not being a public highway, and such person not being the owner or occupier, or servant, or one of the family of the owner or occupier of such land or ground,) with intent to evade the payment of the tolls granted by any act of Parliament; or if any owner or occupier of any such land or ground shall knowingly or willingly permit or suffer any person, (except as aforesaid,) with any horse, cattle, beast, or carriage whatsoever, to go or pass through or over such land or ground, with intent to evade any such tolls; or if any person shall give or receive from any person other than the collectors of the tolls, or forge, counterfeit, or alter any note or ticket directed to be given, with intent to evade the payment of the tolls or any part thereof; or if any person shall fraudulently or forcibly pass through any such toll gate (a) with any horse, cattle, beast, or carriage; or shall leave upon the said road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened; or shall take off, or cause to be taken off, any horse or other beast or cattle from any carriage, either before or after having passed through any toll gate, or, having passed through any toll gate, shall afterwards add or put any horse or other beast to any such carriage, and draw therewith upon any part of any turnpike road, so as to increase the number of horses or other beasts drawing the said carriage after the same shall have passed through any toll gate, whereby the payment of all or any of the tolls shall or may be evaded; or if any person shall do any other act whatever in order or with intent to evade payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l*.

This section is to be read with the 32nd section, and therefore a person going with a carriage and horse along a turnpike road for less than 100 yards, and then turning into a private road, where he had no right to go, with intent to evade payment of the toll upon the turnpike road, is not liable to be convicted under this section, because he has not actually used the road for 100 yards. (*Veitch v. Exeter Roads Trustees*, 27 *L. J. M. C.* 116.)

Sect. 20. If any person or persons shall unload, or cause to be un-

9. Tolls.

Geo. 4, c. 126.

Any justice may settle disputes concerning tolls.

Penalty, not exceeding 5*l*., for evading tolls.

(a) This word is used synonymously with "turnpike gate." (*Barnes v. White*, 1 *C. B.* 192.)

9. *Tolls.*

3 Geo. 4, c. 126.
loading goods, &c.
to evade toll, or
obstructing the
weighing, 5*l.* on
owner of waggon,
&c., and not ex-
ceeding 40*s.* on
driver.

* *Sic.*

† *Sic.*

‡ *Sic.*

Assaulting col-
lector, passing
through gate
without paying
toll, not exceeding
10*l.* penalty.

* *Sic.*

Claiming exemp-
tion.
Giving credit for
tolls.

3 Geo. 4, c. 126.
Powers for trus-
tees to let to farm
the tolls.

laden, any goods, wares, or merchandise, from any cart, waggon, or other carriage, at or before the same shall come to any turnpike gate or weighing engine, erected by virtue or in pursuance of this or any other act made for the repair or preservation of any turnpike road, or shall load or lay upon such carriage after the same shall have passed any such turnpike or weighing engine, any goods, wares, or merchandise, taken or unladen from any horse, cart, or other carriages, belonging to or hired or borrowed by the same waggoner or carrier, in order to avoid the payment of the said respective duties payable for over-weight; or if any person shall so unload in order to carry considerable quantities of goods through any turnpike gate or by any weighing engine in one and the same day, and thereby pay less toll at such turnpike gate or weighing engine than would have been paid if such goods, wares, or merchandise had not been so unladen; or if any driver of any waggon or cart shall not wait a reasonable time, whilst any other carriage shall be weighed, which shall have come to the weighing engine before the carriage of which he shall be the driver; or if the driver of any waggon or cart shall refuse or delay to remove or drive any such waggon or cart from the weighing machine, in order by such neglect or refusal to impede or delay the weighing of any other waggon or cart, or shall turn or drive out of any road in order to avoid or evade the weighing of any waggon or cart; each and every person so offending in any of the cases aforesaid,* and being thereof lawfully convicted before one or more justice or justices of the peace for the limit where the offence shall be committed, upon the oath of one or more credible witness or witnesses, shall forfeit and pay the sum of 5*l.*†, to be levied upon the goods and chattels of the owner of such cart, waggon, or other carriage‡; and each and every driver, not being the owner of such waggon or carriage, so offending, and being thereof convicted as aforesaid, shall forfeit and pay any sum not exceeding 40*s.*; and in case of nonpayment thereof, shall be committed to the house of correction for any time not exceeding two calendar months. See further, as to obstructing the weighing of carts, &c., *ante*, p. 1224.

Sect. 139. In case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this act, or any particular act made for amending any turnpike road, or shall assault any surveyor, or any collector or collectors of the tolls, in the execution of his or their office or offices, or shall pass through any turnpike gate or gates, rail or rails, chain or chains, or other fence or fences set up or to be set up by authority of Parliament, without paying the toll appointed to be paid at such gate or other fence, or shall* hinder or make any rescue of cattle or other goods distrained by virtue of this act, every such person offending therein shall, for every such offence, forfeit any sum not exceeding 10*l.*, at the discretion of the justice or justices of the peace before whom he or she shall be convicted.

In *Reg. v. Irving*, 12 *Q. B.* 429, the court was divided in opinion upon the question whether this section applied to a person passing through a toll gate without violence, and not paying the toll demanded, believing himself to be exempt.

As to the penalty for claiming to be exempt from toll, see p. 1229.

As to giving credit for tolls, see p. 1243.

12. LETTING TO FARM, AND DUTIES AND POWER OF LESSEE AND COLLECTOR.

By stat. 3 Geo. 4, c. 126, s. 55, it shall and may be lawful for the trustees or commissioners of every turnpike road, at a public meeting, to let to farm the tolls of the several gates erected upon their respective turnpike roads, in the manner hereinafter mentioned, although no express power shall have been given by any act or acts for that purpose; and that whenever any tolls shall hereafter be let to farm, by virtue of

the powers given by this or any other act or acts of Parliament, the following directions shall be observed: (that is to say), the trustees or commissioners shall cause notice [see *Form*, No. 82, *post*] to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year, clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the best bidder, on his producing sufficient sureties for payment of the money monthly, or otherwise (as in such notice shall be specified (a)), and that they will be put up at the sum which they were let for or produced in the preceding year, clear of the salary of the collector; and, to prevent fraud, or any undue preference in the letting thereof, the trustees or commissioners are hereby required to provide a glass with so much sand in it as will run from one end of it to the other in one minute, which glass at the time of letting such tolls shall be set upon a table, and immediately after every bidding the glass shall be turned, and as soon as the sand is run out, it shall be turned again, and so for three times, unless some other bidding intervenes; and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls (b), and shall forthwith enter into a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit; and if the person being the last bidder shall not forthwith enter into such agreement, it shall and may be lawful to put up the said tolls again immediately for another bidder, and in like manner to continue putting up the same until a bidder shall be found, who shall enter into such agreement; and in case no bidder shall offer, or in case the same shall not be let at such auction, it shall be lawful for the said trustees or commissioners to accept a private tender for the same, and to demise or let to farm, or agree to demise or let to farm, all or any of such tolls, at any sum not less than the sum at or for which they shall then have been last let; or the said trustees or commissioners may appoint a collector of such tolls, or fix some future day for the letting thereof, as they shall judge most proper, upon giving such notice thereof as aforesaid, and shall and may in that case put them up at such sum as they shall think fit (c); and if the person or persons who shall be the farmer or renter, or collector or collectors, of

9. Tolls.

3 Geo. 4, c. 126.

Notice to be given of letting tolls.

Tolls to be put up at sum produced the preceding year.

Mode of receiving biddings.

If tolls be not let at such auction, a private tender may be accepted.

Penalty on collectors taking more

(a) By a memorandum of agreement between the trustees of a turnpike road and N., the trustees agreed to let, and N. to take the tolls for a year at a certain rent; and N., as renter of the tolls, and D., as a surety, severally promised the trustees that N. should pay the rent, and perform the conditions annexed to the agreement. Held, that the contract was several, and not joint, and that the trustees could not sue the parties jointly for arrears of the rent. (*Lee v. Nixon*, 1 A. & E. 201.)

(b) Trustees under this act put up tolls subject to other conditions than the above, one of which was, that, unless there should be three biddings, there should be no letting, unless the

trustees thought proper to take less than three biddings; and that the trustees should have a reserved bidding. There was one bidding only, which was made by the plaintiff; whereupon the trustees declared, that if there was no advance, they should be obliged to make a reserved bidding. The minute glass was turned thrice, and there was no further bidding. The plaintiff insisted that, under the express terms of the act, he was the purchaser, and he filed his bill for a specific performance:—Held, that he was not entitled to relief, and the bill was dismissed, but without costs. (*Levy v. Pendergrass*, 2 Beav. 415.)

(c) By a local statute, prior to the general turnpike act, 3 Geo. 4, c. 126,

9. *Tolls.* such tolls, shall take a greater or less toll from any person or persons than what is authorised or directed by this or the particular turnpike act, he or they shall, for every such offence, forfeit the sum of 5*l.*, and the said agreement for renting the tolls shall, if the said trustees or commissioners shall think fit to vacate the same, become and be null and void (a): Provided always, that at all such lettings the trustees or commissioners shall be entitled to bid for the tolls so to be let, either by themselves or their clerk, or treasurer, or any other person by them respectively authorised; [see 4 Geo. 4, c. 95, s. 53;] provided also, that no such tolls shall be demised or leased for any longer term than 3 years at any one time (b) (c).
- 3 Geo. 4, c. 126. or less than the authorised toll, 5*l.*
- Trustees may bid.
- Limiting leases to three years.
- Lease of tolls.
- Debt for tolls.
- Where trustees of a turnpike road were authorised to let the tolls, upon giving certain notice of their intention to do so; and such notice was to state the amount which the tolls produced during the preceding year, clear of the expenses of collecting; it was held, that whereas the notice merely stated the amount received by the trustees during the preceding year, although during part of that time the tolls were let for a greater sum than they had actually produced, and no expenses were allowed for collecting during that part of the year, the notice was insufficient. (*Newman v. Ring*, 15 L. J. 365, Ch.) In an action for rent payable under an agreement with trustees of turnpike roads, the declaration need not show that the forms required by s. 55 were complied with in the letting. (*Willington v. Browne*, 8 Q. B. 169.)
- Debt for turnpike tolls has been held to lie in a case where the defendant by a misrepresentation induced the collector at a certain toll-gate to believe that he was not entitled to demand or to receive

trustees of a turnpike road were empowered to let the tolls by writing under their hands and seals, the rent to be made payable to their treasurer, in default of which every such lease should be "null and void, to all intents and purposes whatsoever:"—Held, that this clause was still imperative, though, by the General Turnpike Act, s. 55, it is enacted, that, after the tolls shall have been let as there directed, the purchaser shall "enter into a proper agreement" for the taking thereof and paying the rent "under such conditions and in such manner" as the trustees shall think fit. Held, further, that a lease making the rent payable to the *trustees or their treasurer*, was not conformable to the local act; that the words "null and void" in that act were not to be construed as "voidable," but that the lessee or his surety might treat the lease as absolutely void; and that the lessee's surety might take advantage of the above defect, in an action brought against him by the trustees for non-payment of the rent, though the lessee had taken the tolls for several years under the lease. (*Pearce v. Morrice*, 2 Adol. & Ell. 84.)

(a) See this offence further noticed, *ante*, p. 1188, and the 4 Geo. 4, c. 95, s. 30, *ante*, p. 1189.

(b) A collector, informally appointed, may yet recover, on an account

stated, tolls for which he has given credit, no objection to his title being made by the trustees or creditors. The defendant, to whom the credit was given, had, by his own acts, acknowledged the state of the account. (*Peacock v. Harris*, 10 East, 104.)

Credit may be given for tolls where there is no collusion. Where the trustees mortgaged the toll house, and no such power was given to them, the deed was held void, and that the trustees were not estopped from the objection; because the court are bound to take notice that the statute gave no such authority. (*Fairtile v. Gilbert*, 2 T. R. 169. See *Doe Levi v. Horne*, 3 Q. B. 757.)

(c) In a declaration on an agreement for the letting of tolls under the above statute, it is not necessary to allege specifically, that all the directions contained in this section have been complied with on the occasion of the letting: it is enough to allege generally, that the tolls "were duly put up and let to farm by auction, by virtue of the powers and in the manner directed by the statutes in that case made and provided." (*Oldroyd v. Crumpton*, 4 Bing. N. C. 24; *Willington v. Browne*, 8 Q. B. 169.) But it seems that the declaration should allege that the agreement was in writing and signed in the manner directed by the statute. (*Id.*)

toll of the defendant; by which means the defendant had been enabled constantly to pass through the gate toll free, and without any demand being made upon him for the toll properly due. (*Maurice v. Marsden* 19 *L. J.* 152 *C. P.*)

An agreement sufficiently complies with the statute which is signed by the clerk, and recites that A. B. is the highest bidder for, and had become the renter of certain tolls, and that the clerk did thereby on behalf of the trustees, agree to let, and that A. B. did agree to take the tolls and toll house. (*Shepherd v. Hoddsman*, 21 *L. J. Q. B.* 263.) The 8 & 9 Vict. c. 106, s. 3, declaring any lease of hereditaments, which is by law required to be in writing, shall be void if not made by deed, does not apply to the letting of tolls. (*Ib.*)

By stat. 4 Geo. 4, c. 95, s. 52, it shall and may be lawful for the trustees or commissioners of any turnpike road, under and subject to the directions and provisions of the said recited act [3 Geo. 4, c. 126] and this act, to let to farm, or agree to let to farm, all or any part of the tolls of the several gates erected upon their respective roads, and all or any of the said gates, either together and in one lot, or by parcels and in several lots; and that in case the said trustees or commissioners shall at any time let to farm the said tolls in parcels or lots, it shall be lawful for the said trustees or commissioners to put up each such parcel or lot at such sum as they shall think fit.

Sect. 53. When the trustees or commissioners of any turnpike road shall put up the tolls to let to farm, the said trustees or commissioners may, if they think fit, appoint some person to bid for the same on their account, to the intent that such tolls may not be let for less than an adequate value (*a*).

Sect. 54, reciting that, in some situations a toll gate or bar, belonging to trustees or commissioners of one road, is placed so near to the gate or bar of the trustees or commissioners of another road, as to be inconvenient to the respective trusts, and to the public, enacts, that it shall and may be lawful for the trustees or commissioners of any turnpike road, if they shall agree thereto, at any public meeting to be holden for that purpose, to take to farm the tolls payable at any toll gate or bar of any other road adjoining or near to the road under their care and management; and the trustees or commissioners so farming the tolls may collect and receive the same, or may reduce the said tolls so farmed, or may discontinue the same, as they shall see fit.

By 3 Geo. 4, c. 126, s. 57, all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer (*c*), and the

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8 Geo. 4, c. 126.

4 Geo. 4, c. 95.
Tolls may be
in lots.

Trustees may bid
at letting of tolls.

Tolls of another
trust adjoining
may be farmed.

3 Geo. 4, c. 126.

Contracts and
agreements to be
valid when signed
by trustees, &c. (*b*).

(*a*) See a similar provision in 3 Geo. 4, c. 126, s. 55, *ante*, p. 1248.

(*b*) See *ante*, p. 1250, *ii.* (*c*).

(*c*) In an action by the clerk of the trustees of a turnpike road against a surety for the lessee of the tolls, the declaration stated, that, at a public meeting of the trustees for letting the tolls, the lessee was the best bidder, and that the trustees declared that he should become tenant to them of the tolls at a certain sum, on the terms and conditions mentioned in a certain agreement; and that, in consideration of the premises, by an agreement then made by and between the trustees and the lessee and his sureties, which said agreement was in writing, and was then duly signed by one H.

D., then being treasurer to the said trustees, and by the said lessee and his sureties, the said lessee and his sureties did severally and jointly agree to and with the said H. D., that they or one of them should and would pay unto the said H. D., his successors and executors, or to whom any five of the said trustees should direct, the several instalments of money therein mentioned; and that, on failure of payment, the trustees might enter into the toll houses and take the tolls. The declaration then stated that the lessee entered into the receipt of the tolls, and paid certain instalments; but that the residue was not paid and satisfied to H. D. and the trustees:—Held, on demurrer,

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3 Geo. 4, c. 126.

Where two persons fill the office of clerk, both must join in contract.

Lessees of tolls may appoint persons to receive same, who shall be subject to like penalties as collectors appointed by trustees.

4 Geo. 4, c. 95.

Lessees, or persons appointed by them may occupy toll houses.

Enabling trustees to take possession of toll house, &c., when let to farm, or held by collectors for trustees, in default of performance of conditions, &c.

lessee or farmer, and his sureties, of such tolls respectively, shall be good, valid, and effectual, to all intents and purposes, notwithstanding the same may not be by deed or under seal^(a); any act or acts of Parliament or law to the contrary thereof notwithstanding.

Where two persons fill the office of clerk to the trustees of a turnpike road, it seems both must join in creating a contract on the part of the trustees under this section. (*Bell v. Dixon*, 9 Bing. 393.) The correctness of this decision was discussed in the case of *Lee v. Nixon* (1 A. & E. 201); but the court gave no opinion on it. In that case, the question decided was as to the contract of the renter and his sureties being joint and several, and it was decided to be several only.

Sect. 58. During such time as the tolls, or any part or parts thereof, shall be leased to any person or persons whomsoever, it shall be lawful for the lessee or lessees, farmer or farmers thereof, or such other person or persons as he, she, or they shall, by writing or writings under his, her, or their hand or hands authorise or appoint, to demand and take such tolls so leased, demised, or farmed, and to use all such means and methods for the recovery thereof, in case of non-payment or evasion, as any collector of such tolls appointed under or by virtue of any act of Parliament for the making of turnpike roads, or by this act, is authorised and empowered to use; and such lessee or lessees, farmer or farmers, or other person or persons as aforesaid, so demanding and taking such tolls, shall be subject to the like pains, penalties, and forfeitures, and shall be liable to the like actions and prosecutions, as any collector of such tolls appointed by the trustees or commissioners is subject or liable to. (See *ante*, p. 1188.)

By 4 Geo. 4, c. 95, s. 58, during such time as the tolls arising on any turnpike road, or any part or parts thereof, shall be leased, demised, or let to any person or persons whomsoever, it shall and may be lawful to and for the lessee or lessees, or farmer or farmers thereof, or such other person or persons as he or they shall authorise or appoint, to occupy and enjoy the toll house or toll houses at which the said tolls so let are to be collected and to arise, with all the appurtenances and conveniences to the same toll house or toll houses belonging, for the purpose of collecting such tolls, during so long time only as such lessee or lessees, farmer or farmers, shall duly and regularly pay his, her, or their rent or rents, and perform the covenants, agreements, and conditions of such lease, demise, or letting, but no further or otherwise.

Sect. 59. In case all or any of the tolls, arising by virtue of any act for repairing or amending any turnpike road, shall have been or shall be demised or let to farm to any person or persons in any manner whatsoever, and the lessee or lessees, farmer or farmers thereof, shall neglect or refuse to perform the terms and conditions on which the same shall have been or shall be so demised or let; or in case the rent or rents agreed to be paid by such lessee or lessees, farmer or farmers, shall be in arrear by the space of 7 days next after any of the days on which the same ought to be paid, pursuant to the agreement for letting to farm thereof; or in case any such lease or agreement shall in any other manner become void; then, and in any of those cases, it shall and may be lawful for any justice of the peace for the county or place, by warrant under his hand and seal, to order a constable or other peace officer, with such assistance as shall be necessary, to enter

that the agreement, as stated in the declaration, was an agreement by the lessee with H. D. in his individual capacity, on which the trustees could not sue. (*Hellings v. Pratt*, 6 Jur. 914—Q. B.)

(a) By the common law there could be no contract or agreement of this kind except under seal. (See *R. v. Marquis of Salisbury*, 8 Ad. & E. 716.)

upon and take possession of any toll house or toll houses, toll gate, bar, or chain, or weighing machine, and the buildings and appurtenances thereto belonging, and to remove and put out such lessee or lessees, farmer or farmers of the toll arising thereat respectively, or other person or persons who shall be found therein, together with his, her, or their goods, out of and from the possession of the said toll house or toll houses, and from the collection of tolls, and to put the said trustees or commissioners, or any one of them, or their new appointed officer, or other person acting by or under their authority, into the possession thereof; and thereupon it shall be lawful for the said trustees or commissioners (if they shall think fit) to vacate and determine the contract or agreement (if any) for demising or letting the said tolls to such lessee or lessees, farmer or farmers, and the same shall be from that time utterly void, to all intents and purposes (save as to the covenants or agreements for payment up to that time of the rent or rents thereby reserved, or other covenants or agreements on the lessee's part, which shall have been holden), as if such demise or agreement had never been made; and it shall be lawful for the said trustees or commissioners, in every such case, to demise or let to farm the said tolls again to any other person or persons, or cause them to be collected, as if no former demise, contract or agreement had been made relative thereto; any rule of law or right to the contrary notwithstanding.

See further as to the duties and liabilities of the collector, *ante*, p. 1187.

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⁴ Geo. 4, c. 95.

Further duties and liabilities collector.

13. MORTGAGE OF TOLLS.

A mortgagee of tolls may act generally as a trustee. (3 Geo. 4, c. 126, s. 64, p. 1160.)

Mortgagee may act as trustee.

By 3 Geo. 4, c. 126, s. 81, it shall be lawful for the trustees or commissioners of any turnpike road to borrow and take up at interest, on the credit of the tolls arising on such road, such sum or sums of money as they shall from time to time respectively think proper, and to demise and mortgage (a) the tolls on such road, or any part or parts thereof, and the turnpikes and toll houses for collecting the same (the costs and charges of which mortgages shall be paid out of the tolls), as a security to any person or persons, or their trustees, who shall advance such sum or sums of money; which mortgages shall be in the words or to the effect following; (that is to say),

3 Geo. 4, c. 126.
Power to borrow money.

"By virtue of an act passed in the year of the reign of , intituled [here set forth the title of this act], we, whose hands and seals are hereunto subscribed and set, being of the trustees [or, 'commissioners'] for putting into execution an act, passed in the year of the reign of , intituled [here set forth the title of the act under which the trustees or commissioners borrowing the money and granting the mortgage shall act], in consideration of the sum of sterling, advanced and paid by A. B. of to the treasurer of the said trustees, [or, 'commissioners'], do hereby grant and assign unto the said A. B. and his executors, administrators, and assigns such proportion of the tolls arising and to arise on the said turnpike road, and the toll gates and toll houses erected or to be erected for collecting the same, as the said sum of doth or shall bear to the whole sum now or hereafter to become due and owing on the security thereof: To have, hold, receive, and take the said proportion of the said tolls, toll gates, toll houses and premises, with the appurtenances, unto the said A. B. and his executors, administrators, and assigns, for and during the residue of the term for which the said tolls are granted by the said last-mentioned

Form of mortgage

(a) Before this act, the trustees had no power to mortgage toll houses, and they were not estopped from disputing the legality of such a mort-

gage, though executed by them. (*Fairtitle v. Gilbert*, 2 T. R. 171, *ante*, p. 1250, n. (b). See *Doe d. Levi v. Horne*, 3 Q. B. 757.)

9. Tolls. *act, unless the said sum of* , *with interest after the rate of* per centum *per annum, shall be sooner repaid and satisfied. Given under our hands this*
 4 Geo. 4, c. 126. *day of* .”

Mortgages may be assigned. And copies of all such mortgages shall be entered in a book or books to be kept for that purpose by the clerk or treasurer to the said trustees or commissioners, for which entry such clerk shall be paid the sum of 5s. and no more, out of the tolls payable on such road, and which said book or books shall and may at all seasonable times be perused and inspected without fee or reward; and it shall be lawful for all persons respectively, to whom any mortgage shall be made as aforesaid, or who shall be from time to time entitled to the money thereby secured, to assign or transfer his, her, or their right, title, and interest in and to such mortgage, and the principal money and interest thereby secured, to any other person or persons whomsoever; which assignment or transfer may be made in the following words, or words to the like effect, to be indorsed on such mortgage security, or to be underwritten or thereunto annexed, and signed in the presence of and attested by one or more credible witness or witnesses; (that is to say),

Form of assignment. “*I, A. B., [or, ‘I, C. D., assignee, executor, or administrator of A. B.,’ as the case may happen], do hereby assign and transfer this mortgage security, with all my right and title to the principal money thereby secured, and all interest now due and hereafter to grow due upon the same, unto E. F., his or her executors, administrators, and assigns. Dated this* day of , *one thousand eight hundred and* .

“*Witness, G. H.*

(Signed) A. B. or, C. D.”

Which transfer shall be produced and notified to the clerk or treasurer of the said trustees or commissioners, within two calendar months next after the day of the date thereof, who shall enter the same in the said book or books, for which entry the said clerk or treasurer shall be paid the sum of 5s. and no more; and such transfer shall then entitle such assignee, his executors, administrators, and assigns, to the full benefit of such mortgage security; and every such assignee may, in like manner, assign or transfer the same, and so *toties quoties*; and it shall not be in the power of any person or persons (except the person or persons to whom the same shall be last transferred, his, her, or their respective executors or administrators) to release, discharge, or make void the original mortgage security or the monies due thereon, or any part thereof; and all persons to whom any such mortgage or transfer shall be made as aforesaid, shall, in proportion to the sum or sums of money thereby secured, be creditors on the tolls by such act granted, and on the said toll gates and toll houses, in equal degree one with another, or in such order as shall be agreed upon and stipulated by the said trustees or commissioners at the time of the advance of their respective shares. (See *Doe d. Banks v. Booth*, 2 B. & P. 219, post, p. 1255.)

If a mortgage be given to the clerk and solicitor to the trustees for money due to him as solicitor, and the mortgage recite the consideration to be money advanced by the solicitor, and the evidence is that, having asked for payment on account of his bill, the mortgage was given, this is a valid mortgage, the transaction being equivalent to advance of money by him, within this section. (*Jones v. Jones*, 5 Exch. 16.)

A mortgagee of tolls has no right to sue the trustees for arrears of interest due, although they may have a surplus in hand. (*Pardoe v. Price*, 16 M. & W. 451.)

Transfer.

A transferee of a mortgage of turnpike tolls, in the general form given by this section, has no title until such transfer has been produced and notified to the clerk or treasurer of the trustees and entered in a proper book kept by such clerk or treasurer; and if the trustees

for managing turnpike roads of a district hold meetings at several places in the district, and appoint separate clerks, who keep separate books at each place, it is sufficient for the clerk at one of those places to enter the mortgage made by the trustees meeting at that place in his book, although the general form is adopted, and the mortgage includes the whole tolls of the district, and although he himself is the mortgagee. (*Doe d. Jones v. Jones*, 19 L. J. 284, *Exch.*) If the transfer is prepared by the clerk of the trustees, that is a sufficient notification of the transfer. (*Id.*)

By 4 Geo. 4, c. 95, s. 60, in case the trustees or commissioners of any turnpike road shall, at any time or times, be desirous of paying off any portion of the principal monies due and owing upon the credit of such road, where all the interest due thereon shall have been duly paid or otherwise satisfied, it shall and may be lawful for them, at any meeting to be holden according to the directions of the said recited act [3 Geo. 4, c. 126], or this act, or of the act or acts in execution of which they shall act (notice of such intended meeting and of the purposes thereof being first given, at least twenty-eight days preceding the same, by advertisement in some newspaper printed in or usually circulated in the neighbourhood of the said road), if they shall think fit, instead of paying the same rateably amongst all the creditors, to determine by lot to which of such creditors the whole or any portion thereof shall be so paid, and to pay the same to such creditor or creditors only, or to any of the creditors, with the consent of all the other creditors.

4 Geo. 4, c. 95.
Trustees may pay any one creditor, to be determined by lot.

Or any one creditor, by consent of the others.

By 3 Geo. 4, c. 126, s. 47, all and every mortgagee and mortgagees that hath or have taken or been in possession, or shall hereafter take or be in possession of any toll gate or bar set up or erected on any turnpike road, or of any lands or tenements, the rents and profits whereof are appropriated to the repairs of any part of any turnpike road, shall, within 21 days after he, she, or they shall have received notice in writing from the trustees or commissioners of such turnpike road, render an exact account in writing to such trustees or commissioners, or to such person as they shall appoint, of all monies received by such mortgagee or mortgagees, or by any other person or persons for his, her, or their use and benefit, or by his, her, or their authority, at such toll gate or bar or otherwise, and what he, she, or they have expended in keeping or repairing the same; and in case he, she, or they shall neglect to render such account when required as aforesaid, he, she, or they shall severally forfeit and pay to the said trustees or commissioners, for every refusal, neglect, or omission, the sum of 50*l.*, to be applied to the use of the road on which such toll gate or bar shall be erected.

3 Geo. 4, c. 126.
Mortgagees in possession of tolls to account to trustees (a).

Sect. 48. If a mortgagee keeps possession after he has received the money due, he shall forfeit double the sum and treble costs, to be recovered by action.

Sect. 49. An action of ejectment may be supported by one mortgagee.

This section obviates a doubt, suggested in *Doe d. Banks v. Booth*, 2 B. & P. 219, viz., that by the ejectment, a mortgagee might obtain a preference. In that case, where the trustees under a turnpike act had demised to one of several mortgagees such proportion of the tolls arising from the road, and of the toll houses and toll gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, and the mortgagee brought ejectment for the toll gates, in order to repay himself the interest due to him:—It was held, that he might well maintain his action, notwithstanding a clause in

(a) Mortgagees under acts passed since 1850 cannot enter into possession if the interest is duly paid. (13 & 14 Vict. c. 79, s. 5, *ante*, p. 1175.)

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the act, that all the mortgagees should be creditors upon the tolls in equal degree.

An action of ejectment brought by a mortgagee of tolls under this section to recover possession of toll gates, &c., was held entitled to the verdict, where, after the commencement of the action another ejectment was commenced on the demise of another mortgage, laid earlier than the one in the first action, but whether the lessor of the plaintiff in the first action would be entitled to a writ of possession was not decided. (*Doe v. Rous*, 1 E. & B. 419.)

The trustees of a local turnpike act granted mortgages of the tolls in the form given by the 81st section of the above act, conveying to each creditor such proportion of the tolls, and the toll gates, and toll houses, as the money advanced by him bore or should bear to the whole sum due or to become due on that security:—Held, that one mortgagee might recover the toll houses and gates in ejectment (pursuant to the above 49th section), notwithstanding a former mortgage, only remaining accountable to the other mortgagees for such proportion of the tolls as they were entitled to in respect of their advances. (*Doe d. Watton v. Penfold*, 3 Q. B. 757.)

By a local turnpike act certain tolls were made subject to the payment of monies borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls in the form given by the General Turnpike Act (3 Geo. 4, c. 126, s. 81), conveying to each creditor such proportion of the tolls and the toll gates and toll houses, as the money advanced by him bore or should bear to the whole sum due or to become due on that security. By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted, that all monies due on such credit should be entitled to “a preference and priority of charge and payment,” before any monies advanced under such act, for making the new branch.

On ejectment for the toll houses with the toll gates thereto belonging by the holder of a mortgage (framed like the former ones), for monies lent to complete the branch road:—Held, that the words “priority of charge” did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might, in his own name only, recover the toll houses and gates in ejectment (pursuant to 3 Geo. 4, c. 126, s. 49), only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. (*Doe d. Thompson v. Lediard*, 4 B. & Ad. 137.)

9 Geo. 4, c. 77.
Mortgages under
former acts to
remain good.

By 9 Geo. 4, c. 77, s. 10, where, at the time of the expiration or repeal of any act for making and maintaining any turnpike road, any monies which may have been borrowed, subscribed, or advanced under the provisions of such act, shall be due and owing on the credit of the tolls thereby granted, the term and tolls to be granted by all and every subsequent act and acts for maintaining such turnpike road shall be, and the same are hereby made subject and liable to the payment of the monies which shall so remain due and owing on the credit of such tolls, and of all interest to grow due thereon, as fully and effectually, to all intents and purposes, as if such monies had been borrowed or become due on the credit or security of the tolls to be granted by such subsequent act or acts; and all and every person and persons, who may owe or be subject or liable to the payment of any sum or sums of money to the trustees for carrying any such former act into execution, shall be liable to the payment thereof to the trustees for executing any such subsequent act or acts, and such monies shall be applied by them for the purposes of such subsequent act or acts.

By sect. 11, bonds, contracts, conveyances, &c., are to remain in full force notwithstanding the repeal of any act. (See *ante*, p. 1164.)

Sect. 12. The trustees appointed by virtue of any local turnpike act, may receive and cancel all or any of the mortgages granted under the trusts of any former act for the same turnpike road, or any part thereof, and instead and in lieu thereof give and execute another mortgage or other mortgages, at the expense of the parties requiring the same.

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9 Geo. 4, c. 77.
Trustees may cancel mortgages and execute others.

Sect. 13. In all cases where it shall appear by the books kept by the clerk or treasurer to the trustees of any turnpike road, or by any satisfactory evidence adduced at any meeting of such trustees, that any person or persons is or are a creditor or creditors on security of the tolls authorised by any local turnpike act to be taken, and that the mortgage or assignment of the tolls for securing any such sum or sums of money has been lost, mislaid, or by accident destroyed, it shall and may be lawful for the said trustees, or any 3 or more of them, to execute, at the expense of the person or persons applying for the same, an assignment of the tolls by any such local turnpike act granted, for the sum or sums of money mentioned in such original assignment or transfer, and every assignment to be executed shall be valid and effectual for the purposes thereby intended.

And renew mortgages, &c., lost or mislaid.

By 4 Geo. 4, c. 95, s. 61, the trustees or commissioners for making or maintaining any turnpike road shall not be personally subject to or liable to be charged with the payment of any sum or sums of money, by reason of their having signed or executed any mortgage or assignment by way of mortgage, or other security to be made by virtue or in pursuance of any act for making or maintaining any turnpike road: Provided also, that in case any action, suit, or prosecution, shall be brought or commenced against any such trustee or commissioner, for any thing done by virtue or in pursuance of the said recited act (3 Geo. 4, c. 126), or this act, or any such act for making or maintaining any turnpike road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the tolls arising on the turnpike road for which such trustee or commissioner shall act. (See *ante*, p. 1177.)

4 Geo. 4, c. 95.
Trustees not personally liable on mortgages.

By a local act, the trustees of certain turnpike roads were empowered to borrow money at interest upon the credit of the tolls, and to assign them by way of mortgage as a security, such money to be repaid out of the money arising from the tolls, and after payment of the expenses of the Act of Parliament, to be disposed of as the said tolls and duties were directed by the act to be disposed of. The plaintiff's testator having advanced 200*l.* on these tolls, the turnpike trustees by deed assigned one-twentieth part of the tolls to secure the 200*l.* and interest; and the plaintiff having brought an action of debt for 400*l.*, the interest due, and averred in the declaration that the tolls received were sufficient to pay all the interest on all the sums advanced on the credit of the tolls:—Held, on special demurrer to the declaration, that the plaintiff was not entitled to maintain an action against the trustees to recover the interest (*Pardoe v. Price*, 11 *M. & W.* 427): *et per cur.*—"We do not see how the plaintiff can maintain this action against the trustees, for he has not been able to point out any clause in the act which makes it compulsory on the trustees to pay the interest. If the plaintiff could succeed at all, it would be on the count for money had and received after notice to the trustees to pay the interest to him; but upon that we give no opinion."

Decision upon local act as to bringing action for interest.

Turnpike tolls are not within the Statute of Limitations (the 3 & 4 Will. 4, c. 27); and, consequently, more than 6 years' arrears of interest may be recovered on a mortgage of turnpike tolls, notwithstanding the 42nd section of that act. (*Mellish v. Brook*, 3 *Beav.* 22.)

Turnpike tolls not within 42nd section of 3 & 4 Will. 4, c. 27.

10. *Injuries, nuisances, &c.*X. *Injuries, Nuisances, and Annoyances, Remedies and Punishments for.*

Division of subject.

Herein of—

1. *Ditches, Drains, &c.*, p. 1258.
2. *Trees and Hedges, &c.*, p. 1260.
3. *Encroachments on roads*, p. 1261.
4. *Laying Rubbish, &c.*, p. 1262.
5. *Gates and Windmills*, p. 1262.
6. *Dogs*, p. 1263.
7. *Cattle Tethered or Straying*, p. 1263.
8. *Riding or Driving on Footways*, p. 1265.
9. *Improper Driving of Carriages, Carts, &c., or without Owners' Names thereon*, p. 1265.
10. *Using Railway Carts and Locomotives on Roads*, p. 1267.
11. *Tires of Wheels*, p. 1273.
12. *Skidpans*, p. 1273.
13. *Destroying Turnpike Gates, &c.*, p. 1274.
14. *And other Injuries and Annoyances not before enumerated—as, Damaging Bridges, &c., Drawing Timber, Injuring Road, Slaughtering Cattle, Obstructing Passengers, Lights in Blacksmiths' Shops, Bonfires, Baiting Bulls, Playing Games, Leaving Carts, &c., Timber, &c., Running Water, &c., Swine, &c., Leaving Blocks of Stone, Damaging Lamps, Tables of Tolls, Posts, Buildings, Drains, Scrapings of Road, Saw-pits, &c.*, p. 1274.

For the apprehension of offenders, and the mode of inflicting the penalties and punishments in general, see pp. 1277 to 1280.

1. DITCHES, DRAINS, &c.

4 Geo. 4, c. 126.
Ditches, &c., to be made by occupiers of lands for keeping the roads dry.

By 3 Geo. 4, c. 126, s. 113, ditches, drains, or watercourses, of a sufficient depth and breadth, for the keeping all turnpike roads dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats, or bridges shall be made and laid where any carriageways, or footways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupier or occupiers of such lands or grounds; and every person or persons who shall occupy any lands or grounds adjoining to or lying near such turnpike road through which the water hath used to pass from the said turnpike road, shall and is and are hereby required, from time to time, as often as occasion shall be, to open, cleanse, and scour the ditches, watercourses, and drains, for such water to pass without obstruction; and that every person making default in any of the matters or things aforesaid, after ten days' notice (a) to him, her, or them given, shall, for every such offence, forfeit any sum not exceeding 5*l*.

In *Merivale v. Exeter Road Trustees*, L. R. 3, Q. B. 149, the appellant was convicted under s. 113 for that she, being the owner and occupier of certain lands next and adjoining a part of the Exeter turnpike road, and having received due notice from the trustees to cleanse, scour, and keep open the ditch, drain, and watercourses of such part of the road as adjoined her land of a sufficient width and depth to carry off the water without obstruction, and keep the road dry, had failed to do so. The

(a) See forms, No. 97 to 102, *post*.

court held that, under this section, the ditch beside the road is to be made and maintained by the trustees, and not by the occupiers of the adjoining land, and, therefore, the obligation to make and keep open the drain beside the road in the 1st part of sect. 113 is cast upon the trustees. The latter part of the section means that, where a drain which runs by the side of a road comes to a spot where the ground is low, and there is an outlet so that the water hath used to pass away from the road, then the occupier of the land through which the water hath used to pass away from the road, shall keep open, cleanse, and scour the ditches for such watercourses to pass without obstruction; but where (as in this case) the water is running alongside the road and does not pass away from the road into any lands of the adjoining occupier, then such occupier does not occupy any lands where water passes away.

Sect. 114. It shall be lawful for the surveyor of every turnpike road, and such person as he or they shall appoint, to turn any watercourses, sinks, or drains running into, along, or out of any turnpike road or any part thereof, to the prejudice of the same, and to open, scour, and cleanse any watercourses or ditches adjoining to any turnpike road, and make the same as deep and large as he shall think proper and necessary, in case the owners or occupiers of the adjoining lands shall neglect to open, scour or cleanse such watercourses or ditches, after 7 days' notice in writing given for that purpose; and the charges thereof, and of removing any annoyances, to be settled by any one or more justices of the peace of the county or place where such part of the turnpike road shall lie, shall be reimbursed to the said surveyor by such owners or occupiers, and the same shall be recovered in such manner as the penalties and forfeitures are herein-after (a) directed to be recovered; and if, after the removal of any of the said annoyances, any person shall again offend in the like kind, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l*. (See the rest of this section, p. 1262.)

Sect. 115. In all cases where any gutter, drain, sink, sewer, or underdrain, made or hereafter to be made, under or at the sides or near any turnpike road, shall be used as well for the conveyance of the water from such turnpike road, as for conveying water, filth, or other matters from the houses or premises, of the inhabitants of any town, hamlet, village, street or place, and no specific mode of repair, or persons liable to the expenses of maintaining the same shall be appointed, the expense of maintaining and repairing such gutter, drain, sink, sewer, or under-drain, shall be borne and defrayed equally or in proportions by the trustees or commissioners of such turnpike road, and the inhabitants of the town, hamlet, village, street, or place using the same; and in order to ascertain the proportion, and recover such expenses, the surveyor of the turnpike road under or at the sides or near to which such gutter, drain, sink, sewer, or underdrain, shall be situated, shall, as often as shall be requisite, repair the same, and shall then make out an account of the costs and expenses of such reparation, and produce the same to any 2 or more justices of the peace acting for the county or place where such gutter, drain, sink, sewer, or underdrain, or so much thereof as shall be repaired, shall lie; and it shall and may be lawful for the said justices, and they are hereby authorised and empowered, to examine the accounts and statements to be produced to them, and to inquire as to the persons using such gutter, drain, sink, sewer, or underdrain, and to proportion the amount to be paid by the trustees or commissioners of the turnpike road, and by the inhabitants and persons using such gutter, drain, sink, sewer, or under-drain respectively, and to fix and ascertain the

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

Watercourses and drains may be turned.

Expenses of repairing drains, &c in towns, to be defrayed between trustees and inhabitants.

An account of the expense of repairs to be laid before two justices, who shall proportion the amount to be paid by the parties.

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

4 Geo. 4, c. 95.
Surveyors may
make drains, &c.

amount of such proportion, as they the said justices, shall deem just and reasonable, to be paid by the said several parties respectively; and if any person or persons shall neglect or refuse to pay the sum directed by the said justices to be paid by him, her, or them, the same shall be levied by distress and sale of the goods and chattels of the person or persons so neglecting or refusing, by a warrant under the hands and seals of any 2 or more justices of the peace, acting for the county or place where such person or persons shall reside.

By 4 Geo. 4, c. 95, s. 67, it shall be lawful for the surveyor and surveyors, and such other person and persons as shall be appointed by the trustees or commissioners of any turnpike road, from time to time to cut, make, or maintain drains or watercourses upon and through any lands lying contiguous to any such road, and also to make ditches in such places, and in such manner as such surveyor and surveyors, by order of such trustees or commissioners, shall judge necessary; and make sufficient fences and barriers, and other erections, on any part or parts of the said road, in order to prevent any rivulet or current of water from flooding the same, as such surveyor or surveyors shall judge necessary; making such satisfaction to the owners or occupiers of such lands so to be used, cut through, or built upon, for the damages which they or any of them may sustain thereby, as such trustees or commissioners shall judge reasonable; and in case of any difference between such owners or occupiers and such trustees or commissioners touching such damages, the same shall be finally settled by any 2 or more justices of the peace for the county, city, or place in which such road shall lie or be situate (a).

See further as to the drains, &c., in highways, *ante*, p. 1047

2. TREES AND HEDGES, &c.

3 Geo. 4, c. 126.

Owners of adjoining lands to cut the hedges and branches of trees obstructing the road.

If neglected for ten days, surveyor may complain to a justice, who may order the same to be done on pain of forfeiting 2s. for every twenty-four feet in length of the hedge (b).

By 3 Geo. 4, c. 126, s. 116, the owners or occupiers of the land next adjoining to every turnpike road shall cut, prune, and trim their hedges to the height of 6 feet from the surface of the ground, and also cut down, prune, or lop the branches of trees, bushes, and shrubs, growing in or near such hedges, or other fences adjacent thereto (such fences, trees, bushes or shrubs, not being in any garden, orchard, plantation, walk, or avenue to a house, nor any tree, bush, or shrub, being an ornament or shelter to a house, unless the same shall hang over the road, or any part thereof, in such a manner as to impede or annoy any carriage or person travelling thereon), in such manner that the turnpike road shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such turnpike road to the damage thereof; and that if such owner or occupier shall not, within 10 days' after notice given by the surveyor for that purpose, cut, prune, and trim such hedges, or cut down, prune, or trim such branches of trees, bushes, and shrubs in manner aforesaid, it shall and may be lawful for the said surveyor, and he is hereby required to make complaint thereof, to some justice of the limit where such turnpike road shall lie, who shall summon the occupier of such lands before him, to answer the said complaint; and if it shall appear to such justice that such occupier has not complied with the requisites of this act in that behalf, it shall and may be lawful for such justice, upon hearing the surveyor and occupier of such land, or his agent (or in default of his or her appearance, upon having due proof of the service of such summons), and considering the circumstances of the case, to order such hedges to be cut, trimmed, and pruned, and such branches of trees, bushes, and shrubs to be cut down, or pruned, or trimmed in such manner as may best answer the purposes aforesaid;

(a) As to the liability of trustees for an injury arising from the cutting

of drains, &c. see *ante*, p. 1179.

(b) See forms, No. 101, &c., *post*.

and if the occupier of such lands shall not obey such order within 10 days after it shall have been made, and he or she shall have had due notice thereof, he or she shall forfeit the sum of 2s. for every 24 feet in length of such hedge which shall be so neglected to be cut, trimmed, and pruned, and the sum of 2d. for every tree, bush or shrub which shall be so directed to be cut down, pruned, or trimmed; and the surveyor, in case of such default made by the occupier, shall, and he is hereby required to cut, prune, and trim such hedges, and to cut down, prune, or trim such branches of trees, bushes and shrubs, in the manner directed by such order, and such occupier shall be charged with and pay, over and above the said penalties the charges and expenses of doing the same, or, in default thereof, such charges and expenses shall be levied, together with the said forfeitures, upon his or her goods and chattels, by warrant from a justice of the peace, in such manner as is authorised for forfeitures, incurred by virtue of this act. [As to levying forfeitures, see p. 1278.]

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

Hedges, &c., may be trimmed at the expense of default.

Sect. 117. No person or persons shall be compelled, nor any surveyor permitted, by virtue of this act, to cut or prune any hedge at any other time than between the last day of September and the last day of March.

Time of cutting hedges and trees.

The road is only the surface over which the public has a right to pass, and not the hedges and fences on each side, which the owners of the land are bound to repair, although the trustees of a turnpike road made such fences, and for several years repaired them. (*R. v. Commissioners of Llandilo*, 2 T. R. 232; *ante*, n. (b) p. 1193.)

As to cutting trees and hedges, and other laws relating thereto, as regards highways in general, see p. 1045.

3. ENCROACHMENTS ON ROADS.

By 3 Geo. 4, c. 126, s. 118, if any person shall make or cause to be made any dwelling-house or other building, or any hedge or other fence on or at the sides of any turnpike road, in such manner as to reduce the breadth or confine the limits thereof, or shall fill up or obstruct any ditch at the side thereof; or shall make or cause to be made any dwelling-house or other building, or any hedge or other fence on any common or waste land on the side or sides of any turnpike road, within the distance of 30 feet, if within 3 miles of any market town, or if beyond that distance, within 25 feet from the middle or centre thereof (a); or shall make any drain, gutter, sink, or watercourse across, or otherwise break up or injure the surface of any turnpike road, or of any part thereof; or shall plough, harrow, or break up the soil of any land or ground, or in ploughing or harrowing the adjacent lands, shall turn his or their plough or harrow in or upon any land or ground within the distances aforesaid from the middle or centre of any turnpike road made or to be made, or make any other encroachment on any turnpike road within the distances aforesaid from the middle or centre thereof; every person so offending shall forfeit, for every such offence, 40s. to such person as shall make information of the same; and it shall be lawful for the trustees or commissioners, who have the care of any such road, to cause such dwelling-house or other building, hedge, ditch, or fence, drain, sink, watercourse, gutter, or other encroachment to be taken down or filled up, or, where any ditch shall be filled up or obstructed, to be opened and cleansed at the expense of the person or persons to whom the same shall belong; and it shall and may be lawful for any one or more justice or justices of the peace of the county where such offence

Persons making encroachments on roads by reducing breadth or narrowing limits thereof;

or making drains across, or otherwise injuring roads;

or turning the plough on the ground within a certain distance of the road; shall forfeit 40s.

Encroachments to be removed.

(a) As to what is the centre, see sect. 124, p. 1157; and *R. v. Gregory*, 5 B. & Ad. 565, as to the interpreta-

tion of statutes prohibiting buildings within a certain distance of the road.

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

Soil and slips,
who owner of.

shall be committed, upon proof thereof to him or them made upon oath, to levy, as well the expenses of taking down or filling up or cleansing such dwelling-house or other building, hedges, ditches, drains, or other encroachments as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, rendering the overplus (if any) to the owner on demand.

Unless expressly declared otherwise, the soil of the road belongs to the original proprietor of the land. (*Davison v. Gill*, 1 East, 69.) The landowners on each side are in general presumed to be the owners of narrow slips on each side. (*Stevens v. Whistles*, 11 East, 51; *Lofft*, 358; *Grose v. West*, 7 Taunt. 39; *Com. Dig. Chemin.*) See p. 1258.

4. LAYING RUBBISH, &C.

Laying rubbish,
&c. ;

removal of

expenses of.

Penalty for a second offence, 5l.

By 3 Geo. 4, c. 126, s. 114, it shall be lawful for the surveyor of every turnpike road, and such person as he or they shall appoint, to remove and prevent all annoyances on every part of every turnpike road, by filth, dung, ashes, rubbish, or any other matter or thing whatsoever, being laid or thrown upon any turnpike road, or upon any open common or waste land within 80 feet of the centre thereof, and to dispose of the same for the benefit of such road, in case the owner shall neglect to remove the same within 12 hours after notice in writing, signed by any 2 trustees, or the surveyor of such road, given to such owner for that purpose, or in case the owner is not known, then after a like notice affixed for 3 days on the nearest turnpike gate; and to turn any watercourses, sinks, or drains running into, along, or out of any turnpike road, or any part thereof, to the prejudice of the same, and to open, scour, and cleanse any watercourses or ditches adjoining to any turnpike road, and make the same as deep and large as he shall think proper and necessary, in case the owners or occupiers of the adjoining lands shall neglect to open, scour, or cleanse such watercourses or ditches after 7 days' notice in writing given for that purpose (a); and the charges thereof, and of removing any annoyances, to be settled by any one or more justices of the peace of the county or place where such part of the turnpike road shall lie, shall be reimbursed to the said surveyor by such owners or occupiers, and the same shall be recovered in such manner as the penalties and forfeitures are hereinafter directed to be recovered; and if, after the removal of any of the said annoyances, any person shall again offend in the like kind, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5l.

And see the general provision, s. 121, *post*, p. 1274.

5. GATES AND WINDMILLS.

Gates to open
inwards.

Gates opening
outwards to be
removed.

By 3 Geo. 4, c. 126, s. 125, no door or gate of any building, park, paddock, field, or inclosure whatsoever, shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered to continue so to open, except the hanging post thereof shall be fixed or placed so far from the centre of any part of such turnpike road, as that no part of such door or gate shall, when open, project over any part of such turnpike road, or any footpaths belonging thereto; and the occupier or occupiers of any building, park, paddock, field, or inclosure having any door or gate opening outwards, contrary to the meaning of this act, shall within 14 days after notice to him, her, or them given, either personally or in writing, from the surveyor of any turnpike road, cause such door or gate to be hung, so that no part of the same, when open, shall project over any

(a) See this part of the provision noticed, *ante*, p. 1259.

part of such turnpike road, or any footpath belonging thereto; and in default thereof, the surveyor of the said turnpike road is hereby authorised to cause the door or gate to be hung according to the intention of this act; and the person or persons guilty of such neglect or default shall, upon complaint made to any justice or justices of the peace acting in and for the county or place where such neglect shall appear, and upon conviction upon the oath of one credible witness, pay to such surveyor such sum as the said justice or justices shall direct, to defray the expense of making the alteration and hanging such door or gate, and shall also forfeit and pay a further sum, not exceeding 40s., for his, her, or their neglect therein, to be fixed by and at the discretion of the justice or justices before whom such conviction shall be made.

Gates in a highway are a nuisance at common law though not locked, but if it has continued time out of mind, it will be assumed that it was set up at first by consent on a composition with the landowner on the setting out of the road. (1 *Hawk. P. C. c.* 79, s. 9.) See also 2 & 3 Vict. c. 45, also 5 & 6 Vict. c. 55, s. 9, and 8 & 9 Vict. c. 20, s. 47, as to gates at level crossings of railways.

See as to the proprietors of railways being obliged to erect gates where railways cross turnpike roads, highways, &c., *ante*, p. 1050.

And see the 5 & 6 Will. 4, c. 50, s. 81, p. 1051, as to the width of gates across public cartways and horseways.

Sect. 127. No person shall hereafter erect, or cause any windmill to be erected within the distance of 200 yards from any part of any turnpike road, under the penalty of 5*l.* for each and every day such windmill shall continue: Provided always, that nothing herein contained shall be construed to render legal the re-erection or continuance of any windmill in any case where, by the common law, such windmill shall be a public or private nuisance (*a*).

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

Owner to pay the expense of removal, and forfeit not exceeding 40*l.*

No windmill to be erected within two hundred yards of road.

6. Dogs.

By 4 Geo. 4, c. 95, s. 76, if any person or persons, having the care of any waggon, wain, cart, or other such carriage conveying goods for hire or reward, or for sale, on any turnpike road, shall not chain or fasten any dog that may be attending him or them on such road to such waggon, wain, cart, or carriage, every person so offending shall forfeit and pay any sum not exceeding 20s.

4 Geo. 4, c. 95.

Carriers' dogs to be fastened to the carriage.

7. CATTLE TETHERED OR STRAYING MAY BE IMPOUNDED, &c.

By 4 Geo. 4, c. 95, s. 75, if any horse, ass, sheep, swine, or other beast or cattle of any kind, shall at any time be found tethered, or wandering, straying, or lying about any turnpike road, or on any part thereof (except on such parts of any road as lead or pass through or over any common or waste or uninclosed ground), it shall and may be lawful for any surveyor of the road where the same shall be found, or any other person or persons whomsoever, to seize and impound every such horse, ass, sheep, swine, or other beast or cattle, in the common pound (if any) of the parish, township, tithing, or place where the same shall be found, or in such other place as the trustees or commissioners of the road where the same shall be found shall have provided or shall provide for that purpose, and the said horse, ass, sheep, swine, or other beast or cattle, there to detain, until the owner or owners thereof shall, for every and each horse, ass, sheep, swine, or other beast or cattle so impounded, pay the sum of 2*s.*, together with the reasonable charges and expenses of impounding and keeping the same, to the treasurer, clerk, or surveyor of the road on which the beast so impounded shall have been found; the said sum of 2*s.* for each beast,

Cattle tethered or found straying on the roads to be impounded.

until payment of a sum and expenses.

10. *Injuries, nuisances, &c.*

4 Geo. 4, c. 95.

Limiting the extent of penalty.

Right of pasturage not taken away.

to be applied to the use of, and in aid of the tolls of such road; and in case the said penalty, charges, and expenses shall not be paid within 5 days after such impounding (notice being thereof first given to the owner, if known at the time, or if not known, by affixing written notices at the two next toll gates on the road nearest to the place where the same shall be impounded), it shall and may be lawful for any one or more justice or justices of the peace of the county or place, where the offence shall have been committed, to order every such horse, ass, sheep, swine, or other beast or cattle to be sold, except where it shall be made to appear to such justice or justices, that the horse, ass, sheep, swine, or other beast impounded, escaped from any inclosure by any gate or fence being wilfully or negligently left open or destroyed by any person not being owner or occupier, of such inclosure, or employed by such owner or occupier, in which case such justice or justices may remit the said penalty; and the money arising from such sale, after deducting the said penalty and charges and expenses of impounding, keeping, and selling every such horse, ass, sheep, swine, or other beast, or cattle, shall be paid to the person whose property the same so sold shall appear to have been; and in case the owner thereof shall not be known, and no application shall be made for the money arising from such sale within 21 days after such sale shall have taken place, the said money shall be applied, after deducting the said charges and expenses, in the same manner as the said penalty of 2s. is hereinbefore directed to be applied: Provided always, that no owner of any horses, asses, sheep, swine, or other beasts or cattle impounded as aforesaid, shall in any case pay more than the sum of 5*l.* over and above the charges and expenses of impounding and keeping the same, for any number of horses, asses, sheep, swine, or other beasts or cattle impounded at one time: And provided always, that nothing in this clause shall be deemed, taken, or construed to extend to take away any right of pasturage which may exist on the sides of any turnpike roads.

It is a question for the magistrates to decide whether animals are wandering, straying, or lying about the road, and if upon the evidence before them, they think that animals found in a road are under the control of a keeper who has charge of them, they ought not to convict under this section. (*Morris v. Jeffries*, 1 *L. R.* 261.) In *Sherburn v. Wells*, 32 *L. J. M. C.* 179, decided under the Metropolitan Police Act, 2 & 3 *Vict. c.* 47, s. 54, which makes it an offence to turn cattle loose on a thoroughfare, it was held that this section did not apply to the case of cattle turned out with a boy to look after them.

See the General Highway Act, s. 74, *ante*, p. 1063.

See, as to parties impounding cattle being obliged to find sufficient food for them, 5 & 6 *Will. 4, c.* 59, sects. 4, 5, 6. And see "*Distress*."

3 Geo. 4, c. 126.

Punishing persons guilty of pound breach.

By stat. 3 Geo. 4, c. 126, s. 123, in case any person or persons shall release, or attempt to release, any cow, horse, ass, swine, or other live stock or cattle which shall be seized for the purpose of being impounded under the authority of this act, from the pound or place where the same shall be so impounded, or shall pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto, or with which the same shall be fastened, or shall rescue or release, or attempt to rescue or release, any distress or levy which shall be made under the authority of this act, until or before such cow, horse, ass, swine, or other live stock or cattle seized or so impounded, or such distress or levy so made, shall be discharged by due course of law, every person so offending shall, upon conviction thereof before any one of his Majesty's justices of the peace for the county or place where the offence shall have been committed, either upon confession of the party or parties offending, or upon the oath of one credible witness, and which oath the said justice is hereby authorised

and empowered to administer, be committed by such justice, by warrant under his hand and seal, to the common gaol or house of correction of such of the said counties wherein the said offence shall have been committed, there to remain without bail or mainprize for any time not exceeding 3 calendar months.

See the 5 & 6 Will. 4, c. 50, s. 75, as to pound breach, p. 1063; and as to pound breach and rescue at common law, see "*Rescue.*"

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

8. RIDING OR DRIVING, &c., ON FOOTWAYS.

By 7 & 8 Geo. 4, c. 24, s. 16, if any person shall injure, damage, incumber, ride upon, drive upon, or otherwise use any public footpath or causeway by the side of and adjacent to any turnpike road, to the prejudice, annoyance, interruption, or personal danger of any person travelling thereon, every person so offending shall be liable to the same penalties in respect of such offences as by the acts hereinbefore recited [3 Geo. 4, c. 126; 4 Geo. 4, c. 95] are imposed in respect of such offences, whether such footpath or causeway be made, maintained, and repaired by the trustees of the turnpike road thereunto adjoining, or by the inhabitants of the parish wherein such footpath or causeway is situated, or by any other person whatever.

7 & 8 Geo. 4, c. 24.
Riding or driving,
&c., on footways.

See the more confined provision in the 3 Geo. 4, c. 126, s. 121, relating to this, p. 1274.

9. IMPROPER DRIVING, &c., OF CARRIAGES, CARTS, &c., AND WITHOUT NAMES OF OWNERS, &c., THEREON.

By 3 Geo. 4, c. 126, s. 130, it shall and may be lawful for any one person to act as the driver of 2 carts on any turnpike road, and for such carts to pass and travel on any turnpike road, being only under the care and superintendence of such single person: Provided always, that such carts, when under the care of only one person, shall not be drawn by more than one horse each, and the horse of the hinder cart shall be attached by a rein or reins to the back of the cart which shall be foremost; and in case the said horse shall not be so attached, the driver of the said carts shall forfeit the sum of 20s., to be recovered as other penalties are by this act to be recovered: Provided also, that this enactment shall not extend, or be construed to extend, to carts travelling on any turnpike road within 10 miles from the cities of London or Westminster.

3 Geo. 4, c. 126.

One driver may take charge of two carts provided they are drawn only by one horse each.

Not to extend to carts within ten miles of London.

Sect. 131, reciting that numbers of carts and waggons, and frequently more than one, are intrusted to the care of children, who are unable to guide the horses drawing the same, enacts, that no cart or waggon travelling on any turnpike road shall be driven by any person or persons who shall not be of the full age of 13 years, under a penalty not exceeding 10s., to be paid by the owner of such cart or waggon.

Children not to drive carts, &c., on penalty of 10s.

Sect. 132 enacts, that if the driver of any waggon or cart of any kind shall ride upon any such carriages in any turnpike road, not having some other person on foot or on horseback to guide the same (such light carts as are usually driven with reins, and are then conducted by some person holding the reins of the horse or horses, not being more than two, drawing the same, excepted), or if the driver of any carriage whatsoever on any part of any turnpike road, shall, by negligence or wilful misbehaviour, cause any hurt or damage to any person or carriage passing or being upon such road, or shall quit the road and go on the other side the hedge or fence inclosing the same, or wilfully be at such distance from such carriage, or in such a situation whilst it shall be passing upon such turnpike road that he cannot have the direction and government of the horses or cattle drawing the same; or if any person shall drive, or act as the driver of any such

Drivers of waggons or carts not to ride thereon, unless some other person on foot guide the same.

Drivers of any carriage causing hurt or damage to others; or quitting the road;

or driving carriage

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3 Geo. 4, c. 126.

without owner's name;
or not keeping the left or near side;
or interrupting free passage;

the driver, if not the owner, to forfeit 40s.;
if he be the owner, 5l.

Penalty on driver not discovering his name.

4 Geo. 4, c. 95.

If driver offend against the provisions of any act, and abscond, the master to pay the penalty (a).

coach, post-chaise, or other carriage let for hire, or waggon, wain, or cart, not having the owner's name as hereby required, painted thereon, or shall refuse to discover the true Christian and surname of the owner or principal owners of such respective carriage; or if the driver of any waggon, cart, coach, or other carriage whatsoever, meeting any other carriage, shall not keep his or her carriage on the left or near side of the road, or if any person shall, in any manner, wilfully prevent any other person or persons from passing him or her, or any carriage under his or her care upon such road, or by negligence or misbehaviour prevent, hinder, or interrupt the free passage of any carriage, or of his Majesty's subjects, on any turnpike road, every such driver so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice of the peace, or by the oath of one or more credible witness or witnesses, before any justice of the peace of the limit where such offence shall be committed, or where such offender shall be apprehended, shall, for every such offence, forfeit any sum not exceeding 40s., in case such driver shall not be the owner of such carriage; and in case the offender be the owner of such carriage, then any sum not exceeding 5l.; and in either of the said cases shall, in default of payment, be committed to the house of correction for any time not exceeding one month, unless such forfeiture shall be sooner paid; and every such driver offending in either of the said cases, shall and may, by the authority of this act, with or without any warrant, be apprehended by any person or persons who shall see such offence committed, and shall be conveyed before some justice of the peace, to be dealt with according to law; and if any such driver, in any of the cases aforesaid, shall refuse to discover his name, it shall and may be lawful for the justice of the peace before whom it shall be taken, or to whom any such complaint shall be made, to commit him to the house of correction for any time not exceeding 3 months, or to proceed against him for the penalty aforesaid, by a description of his person and the offence only, without adding any name or designation, but expressing in the proceedings that he refused to discover his name.

By 4 Geo. 4, c. 95, s. 73, in case the driver of any waggon, cart, or of any coach or other carriage, shall offend against any of the provisions of any act for making or maintaining any turnpike road, or the said recited act [3 Geo. 4, c. 126], or this act, whereby any penalty

(a) The now repealed highway act (13 Geo. 3, c. 78, s. 60) imposed a penalty on the driver of a cart, &c., for riding thereon, under the circumstances therein mentioned (being the same as 3 Geo. 4, c. 126, s. 132, *supra*), and authorised a justice, on his own view, or upon the oath of one witness, to convict the offender. And in case such offender refused to discover his name, or the name of the owner of the cart, &c., he was subjected to the like penalty, and might, without warrant, be apprehended forthwith by the person seeing the offence committed. Where the driver of a waggon committed an offence within this act in the view of a justice, and having placed himself before the board on which the master's name was painted, so as to prevent the discovery of the owner, and

the justice, in order to ascertain the name, stopped the horses, and laid hands on the driver, and removed him from his position before the board, and thereby informed himself of the ownership: it was held by the Court of King's Bench, on demurrer, that this was a trespass, and gave the driver a right of action. "In this case," it was observed by the court, in delivering judgment, "two offences were completed, the riding upon the waggon, and the refusing to communicate the owner's name; for either of these the defendant (the magistrate) might have convicted the plaintiff (the driver) on his own view as a magistrate, or have apprehended him as a private individual, for the purpose of being dealt with according to law. He does neither: but lays hands on the plaintiff, and removes him

shall be incurred, and shall refuse to give his name, or shall abscond or absent himself so as not to be found, then it shall and may be lawful for any justice of the peace before whom complaint shall be made, and he is hereby required to issue a summons, requiring the owner of such waggon, cart, or other carriage to appear before him to answer the matter of such complaint; and if such owner shall refuse or neglect to appear, or appearing shall not then, or within 10 days thereafter, produce the driver so offending, or disclose his name and place of abode, then the said justice, or any other justice of the peace, on an examination of the circumstances, and ascertaining, by the examination of witnesses on oath, that such offence has been committed by any such driver of any waggon, cart, or other carriage, shall order and adjudge that the penalty incurred by such driver shall be paid by the owner of such waggon, cart, or other carriage; which penalty shall be recovered and applied in manner directed by the said recited act [3 Geo. 4, c. 126].

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4 Geo. 4, c. 95.

Sect. 15, for the better discovery of offenders, enacts, that the owner or owners of every waggon, wain, or cart, or other such carriage, shall, from and after the 1st day of October, 1823, paint, or cause to be painted, in one or more straight line or lines upon some conspicuous part of the right or off side of his, her, or their waggon, wain, or cart, or other such carriage, or upon the off side shafts thereof, before the same shall be used on any turnpike road, his, her, or their Christian and surname, and the place of his, her, or their abode, or the Christian and surname and place of abode of the principal partner or owner thereof, at full length, in large legible letters not less than 1 inch in height, and continue the same thereupon so long as such waggon, wain, cart, or other such carriage shall be used upon any turnpike road; and every owner and proprietor of any waggon, wain, or cart, or other carriage, who shall use or allow the same to be used on any turnpike road without the names and descriptions painted thereon as aforesaid, or who shall paint, or cause to be painted, any false or fictitious name or place of abode, on such waggon, wain, or cart, or other carriage, shall forfeit and pay for every such offence, a sum not exceeding 5*l*.

For discovery of offenders, names of owners to be painted on waggons, &c., in the manner herein mentioned.

Penalty, 5*l*.

30 & 31 Vict. c. 121, s. 4. From and after the passing of this act, no driver of any waggon or cart of any kind shall be liable to any penalty for riding upon such carriage in any turnpike road, provided such driver shall not ride upon the shafts of such carriage, but shall carefully drive such carriage by means of reins held in his hands, such reins being attached to every horse drawing the same.

30 & 31 Vict. c. 121.

Provision as to drivers of carts, &c., riding on carriages on turnpike roads.

Other provisions.

As to driving on footpaths, see p. 1265.

As to leaving carts unguarded, see p. 1275.

As to using skidpans, see p. 1273.

As to the evasion of tolls, see p. 1247, 1241.

See the various regulations as to driving, drivers, and owners of carriages, upon highways in general, p. 1275.

10. USING RAILWAY CARTS AND LOCOMOTIVES ON ROADS.

By 4 Geo. 4, c. 95, s. 16, if any waggon or cart, built or constructed to be and usually used on any railway or tramroad, shall be drawn or pass loaded on any turnpike road, out of and away from such railway or tramroad, for the distance of more than 100 yards, the owner or proprietor of every such waggon or cart shall forfeit and pay the sum of 40*s*., and the driver thereof, not being the owner, the

4 Geo. 4, c. 95.

Loaded carts used on railways and tramroads not to be drawn on turnpike roads.

Penalty.

from the cart. This he was not authorised by law to do; the act was an assault at law, and cannot be justified by the plea which he has put

on the record." (*Jones v. Owen*, 2 D. & R. 600.) See now the 5 & 6 Will. 4, c. 50, ss. 77, 78, 79, *ante*, pp. 1052, 1061.

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sum of 20s. for each and every time such waggon or cart shall be so drawn and pass.

As to how far the use of locomotive engines may be a nuisance at common law, see *R. v. Pease* (4 B. & Ad. 30); and *Rex v. Morris* (1 B. & Ad. 441).

24 & 25 Vict. c. 70.
Locomotives.

By 24 & 25 Vict. c. 70, "An act for regulating the use of locomotives, on turnpike and other roads, and the tolls to be levied on such locomotives and on the waggons and carriages drawn or propelled by the same" it is enacted:—

Scale of tolls to be taken after passing of this act.

Sect. 1. All trustees, corporations, commissioners, and other persons acting under and in execution of any existing general or local turnpike road act or public bridge act shall demand and take tolls not exceeding the tolls following; that is to say,

Weight of locomotives.

For every locomotive propelled by any power, containing within itself the machinery for its own propulsion, such a toll for every 2 tons weight or fractional part of every 2 tons weight that such locomotive shall weigh as shall be equal to the toll or tolls by their respective acts made payable for every horse drawing any waggon, wain, cart, or carriage with wheels of a width similar to those of such locomotive; or in the case of a toll by any such act made payable being charged on the horse or horses drawing any such waggon, wain, cart, or carriage, without reference to the width of the wheels thereof, then such a toll for every 2 tons or fractional part thereof that such locomotive shall weigh as shall be equal to one horse drawing such waggon, wain, cart, or carriage; which tolls respectively shall be payable so often as tolls made payable as aforesaid for such waggon, wain, cart, or carriage shall be payable at the same gate: Provided always, that if the wheels of such locomotive shall rest upon any shoe or other bearing the surface of which shall bear upon the ground so as to prevent the wheels coming in contact therewith, such and the same tolls only shall be demanded and payable as if the wheels thereof were of a width similar to such shoe or bearing:

For every waggon, wain, cart, or carriage drawn or propelled by any locomotive, for each pair of wheels thereof such a toll as shall not exceed the toll by their respective acts made payable for two horses drawing any waggon, wain, cart, or carriage with wheels of a similar width, and for every additional wheel thereof one half toll in addition to the said toll; or in the case of a toll by any such act made payable being charged on the horse or horses drawing any such waggon, wain, cart, or carriage without reference to the width of the wheels thereof, then such a toll for each wheel as shall be equal to one horse drawing such waggon, wain, cart or carriage; which said toll or tolls shall be payable so often as the toll made payable as aforesaid for such waggon, wain, cart or carriage drawn by horses shall be payable at the same gate:

Provided always, that in every case where the wheels of any waggon, wain, cart, or carriage shall not all be cylindrical, as described in the 3 Geo. 4, c. 126, s. 9, the toll payable in respect thereof shall be one half more.

Repeal of former enactments as to tolls to be taken for locomotives.

Sect. 2. All clauses and provisions in any local or general turnpike road act or public bridge act authorising tolls to be demanded or taken upon locomotives or carriages drawn by steam or any other than animal power, different to the tolls herein provided for, shall, so far as the same relate to such tolls, be and the same are hereby repealed: Provided always, that this enactment shall not be deemed or construed to extend to any tolls authorised to be taken in respect of any private

roads or private bridges, or to the roads comprised in "The commercial roads continuation act, 1849."

Sect. 3. Every locomotive propelled by steam or any other than animal power, not drawing any carriage, and not exceeding in weight 3 tons, shall have the tires of the wheels thereof not less than 3 inches in width, and for every ton or fractional part thereof additional weight, the tires of the wheels thereof shall be increased one inch in width; and every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than nine inches in width; but no locomotive shall exceed 7 feet in width or 12 tons in weight, except as hereinafter provided; and the wheels of every locomotive shall be cylindrical and smooth soled, or used with shoes or other bearing surface of a width not less than 9 inches; and the owner or owners of any locomotive used contrary to the foregoing provisions shall for every such offence, on summary conviction, forfeit any sum not exceeding 5*l*.: Provided always, that whereas it may be desirable that locomotives of a greater width than 7 feet and of a greater weight than 12 tons should be allowed to be used under certain circumstances, any person desiring to use any such locomotive on any street or public highway within the city of London or the liberties thereof, or within the limits of the metropolis as defined by the 18 & 19 Vict. c. 126, for the better local management of the metropolis, or within any other city or municipal or parliamentary borough or on any turnpike road or other public highway, shall apply within the city of London to the lord mayor for the time being, or within any municipal or parliamentary borough in Scotland to the lord provost or other chief magistrate thereof, and in other places to the corporation, commissioners, trustees, and surveyors, or other persons having the charge of any such street, highway, turnpike, or other road over which it may be proposed to work such locomotive, for permission to use the same; and the said lord mayor, the said lord provost or chief magistrate, or such corporation, commissioners, trustees, surveyor, and other persons as aforesaid, shall have power to authorise such locomotive to be used on such road or roads, or part of any road or roads, and under such condition or conditions as to them may appear desirable; but in the case of the surveyor or surveyors of any highway in England no such permission shall be valid without also it be approved by the justices acting in petty sessions for any petty sessional division within which it is proposed to use such locomotive.

Sect. 4. It shall not be lawful for any waggon, wain, cart, or other carriage so drawn or propelled as aforesaid, not having cylindrical wheels, to carry any greater weight, than is permitted in such waggon, wain, cart or carriage by the general turnpike act; and it shall not be lawful for any waggon, wain, cart or other carriage having cylindrical wheels, to carry over or above the weight of the waggon, wain, cart, or carriage, any greater weight than one ton and a half for each pair of wheels, unless the fellies, tires, or shoes are 4 inches or more in breadth; nor to carry a greater weight than 2 tons for each pair of wheels, unless the fellies, tires, or shoes are 6 inches or more in breadth; nor to carry a greater weight than 3 tons for each pair of wheels, unless the fellies, tires, or shoes are 8 inches or more in breadth; and for every single wheel one half of that permitted to be carried on a pair of wheels; nor in any case to carry a greater weight than 4 tons on each pair of wheels, or 2 tons on each wheel; but if such waggons, wains, or other carriages are built and constructed with springs upon each axle, then they shall be allowed to carry one sixth more weight in addition to the above-mentioned weights upon each pair of wheels: Provided always, that the regulation of weight herein mentioned and provided shall not extend to any waggon, wain, cart, or other carriage carrying only one tree, or one log of timber, or

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24 & 25 Vict. c. 70.
As to the size and weight of locomotives.

As to the weight on each pair of wheels.

10. *Injuries, nuisances, &c.*

24 & 25 Vict. c. 70.

Power to secretary of state to prohibit the use of locomotives destructive to highways or dangerous to the public.

Use of locomotives restricted over suspension and other bridges.

Damage caused by locomotives to bridges to be made good by owners.

one block of stone, or one cable or rope, or one block, plate, roll, or vessel of iron or other metal, or compound of any two or more metals cast, wrought, or united in one piece.

Sect. 5. In case it appear to one of her Majesty's principal secretaries of state that the use of any particular description of locomotive causes excessive wear and tear of the highways, or is dangerous or inconvenient to the public, or that the use of locomotives generally or of any particular description of locomotive is dangerous or inconvenient to the public in certain districts or places, it shall be lawful for such secretary of state from time to time, by order under his hand, to prohibit the use of any kind or description of locomotive specified in such order on any highway whatsoever, or to prohibit the use of locomotives, or any specified kind or description thereof, on the highways within any place, district, or limit mentioned in such order, or otherwise to restrict the use of locomotives as circumstances may appear to him to require, and from time to time, by order made as aforesaid, to revoke or alter any such order previously made; and every order made under this enactment shall be published in the *London Gazette*, and any person using any locomotive contrary to any such order shall for every such offence, on summary conviction thereof before two justices, forfeit any sum not exceeding 10*l*.

Sect. 6. It shall not be lawful for the owner or driver of any locomotive to drive it over any suspension bridge nor over any bridge on which a conspicuous notice has been placed, by the authority of the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridgemaster, under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge; and in case such owner of the locomotive and surveyor of the road or bridge, or bridgemaster, shall differ in opinion as to the sufficiency of any bridge to sustain the transmit of the locomotive, then the question shall be determined by an officer to be appointed, on the application of either party, by one of her Majesty's principal secretaries of state, whose certificate of sufficiency of such bridge shall entitle the owner of the locomotive to take the same over such bridge.

Sect. 7. Where any turnpike or other roads, upon which locomotives are or hereafter may be used, pass or are or shall be carried over or across any stream or watercourse, navigable river, canal, or railway, by means of any bridge or arch (whether stationary or moveable), and such bridge or arch, or any of the walls, buttresses, or supports thereof, shall be damaged by reason of any locomotive or any waggon or carriage drawn or propelled by or together with a locomotive passing over the same or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other person interested in, or having the charge of such navigable river, canal or railway, or the tolls thereof, or of such bridge or arch, shall be liable to repair or make good any damage so to be occasioned, or to make compensation to any person for any obstruction, interruption or delay which may arise therefrom to the use of such bridge or arch, navigable river, canal, or railway, but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons as aforesaid respectively interested in or having the charge of such river, canal, or railway, or the tolls thereof, or of such bridge or arch, by and at the expense of the owner or owners or the person or persons having the charge of such locomotive at the time of the happening of such damage; and all such owner and owners, person and persons, having the charge of such locomotive as aforesaid, shall also be liable, both jointly and severally, to reimburse and make good as well to the proprietors, undertakers,

directors, conservators, trustees, commissioners, and other persons interested in, or having the charge of any such navigable river, canal, or railway, or the tolls thereof, or of such bridge or arch, as to all persons navigating on or using, or who but for such obstruction, interruption, or delay would have navigated on or used the same, all losses, and expenses which they or any of them may sustain or incur by reason of any such obstruction, interruption, or delay, such losses and expenses to be recoverable by action at law, which action, in case of such proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons so interested, as aforesaid, may be brought in the name or names of their agent or agents, clerk or clerks for the time being, or by any person or persons legally authorised to act in their behalf.

Sect. 8. Every locomotive propelled by steam or any other than animal power to be used on any turnpike road or public highway shall be constructed on the principle of consuming and so as to consume its own smoke; and any person using any locomotive not so consuming its own smoke shall, on conviction thereof before any 2 of her Majesty's justices of the peace, forfeit any sum not exceeding 5*l.* for every day during which such locomotive shall be used on any such turnpike road or public highway.

Sect. 9. It shall not be lawful for any owner of such locomotive, either in his own person or by his servants, to use any such locomotive, waggon, or carriage on the turnpike or other roads, except there be at the least two persons to drive or conduct such locomotive, and if more than two such waggons or carriages be attached to such locomotive, one person to take charge of such waggons, and carriages; and any person in charge of such locomotive shall provide two efficient lights, to be affixed conspicuously, one at each side, on the front of the same, between the hours of one hour after sunset and one hour before sunrise; and any person acting contrary hereto shall for every such offence, on summary conviction thereof before 2 justices, forfeit any sum, not exceeding 5*l.*

Sect. 10. All waggons, wains, carts, or carriages, as hereinbefore described, drawn by any locomotive, and loaded with any materials such as are now exempt from toll under the provisions of any general or local act; shall be entitled to the same exemption as they would be if drawn by animal power.

Sect. 11. It shall not be lawful to drive any locomotive along any turnpike road or public highway at a greater speed than ten miles an hour, or through any city, town, or village at a greater speed than five miles an hour; and any person acting contrary hereto shall for every such offence, on summary conviction thereof before 2 justices, if he be not the owner of such locomotive, forfeit any sum not exceeding 5*l.*, and if he be the owner thereof, shall forfeit any sum not exceeding 10*l.*

Sect. 12. All the clauses and provisions of any general or local acts relating to turnpike roads or highways shall, so far as the same are not expressly altered or repealed by or are not inconsistent with the provisions of this act, apply to all locomotives propelled by other than animal power, and to all waggons, wains, carts, and carriages of any other description drawn by such locomotive, and to the owners, drivers, and attendants thereof, in like manner as if drawn by animal power: Provided always, that the weight of every locomotive, and the name of the owner or owners thereof, shall be conspicuously and legibly affixed thereon; and any owner not having affixed such weight and such name shall, upon conviction thereof before 2 justices, forfeit any sum not exceeding 5*l.*; and any owner who shall fraudulently affix thereon any incorrect weight shall, upon conviction thereof, forfeit any sum not exceeding 10*l.*

Sect. 13. Nothing in this act contained shall authorise any person

10. *Injuries, nuisances, &c.*
24 & 25 Vict. c. 70.

Locomotives propelled by steam to consume their own smoke.

As to the number of persons in charge of locomotive and waggons.

Lights to be used at night.

Exemption from tolls of waggons, &c., now exempt under any general or local act.

Limit of speed of locomotives on public highways, &c.

Provisions of general acts relating to turnpike roads to apply to locomotives.

Right of action in case of nuisance.

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24 & 25 Vict. c. 70.

Short title.

28 & 29 Vict. c. 83.

to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this act, such indictment or action could be maintained.

Sect. 14. This act may be cited as the "Locomotive Act, 1861."

In 1865 the 28 & 29 Vict. c. 83 was passed, whereby sections 5, 9, 11, and 15 of the 24 & 25 Vict. c. 70 were repealed temporarily, until the 1st of September, 1867, when the act itself expired; the above sections are therefore again in force and are printed with the other clauses of the 24 & 25 Vict. c. 70. The act of 1865 being no longer in force it is unnecessary to insert its provisions.

11. TIRES OF WHEELS.

4 Geo. 4, c. 95.

Nails of the tires of wheels of waggon, &c., to be so countersunk as not to project beyond one quarter of an inch above surface of tires.

Penalty on using them contrary hereto.

By 4 Geo. 4, c. 95, s. 2, the several nails of the tire or tires of the wheels of every waggon, wain, cart, or other such carriage used or drawn on any turnpike road, shall be so countersunk as not to project beyond one quarter of an inch above any part of the surface of such tire or tires; and if any waggon, cart, or other such carriage, shall be drawn or used on any turnpike road, with any wheel or wheels made, constructed, or being otherwise than as hereinbefore last described, the owner or owners thereof shall forfeit any sum not exceeding 40s., and every driver thereof any sum not exceeding 20s., for each and every time that such waggon, cart, or other such carriage shall be used or drawn on any turnpike road.

As to the extra tolls in respect of the wheels, see p. 1225.

See, as to nuisances at common law from wheels, p. 1054.

12. SKIDPANS TO BE USED.

3 Geo. 4, c. 126.

Directing the using of skidpans or slippers.

Penalty on driver not using them not exceeding 20s.

By 3 Geo. 4, c. 126, s. 126, it shall and may be lawful to and for the trustees or commissioners of every turnpike road, at any meeting to be held for that purpose, on 10 days' notice in writing of such meeting being affixed upon the turnpike gates on the road, and they are hereby authorised and empowered, from time to time as they shall think fit, to order and direct that in all cases where any waggon or cart shall descend any hill or hills on the said road with either of the wheels locked, a skidpan or slipper shall be used or placed at the bottom of such wheel during the whole time of its being so locked, in such manner as to prevent the said road from being destroyed or injured by the locking of such wheel; and that it shall and may be lawful for the said trustees or commissioners from time to time to repeal, alter, or renew such order as they shall think necessary; and that whilst any such order so to be made as aforesaid shall be in force, all and every person or persons who shall drive or act as the driver of any waggon or cart down any hill or hills with either of the wheels locked, and without using or having such skidpan or slipper at the bottom of such wheel in manner aforesaid, shall, for every such offence, forfeit and pay any sum not exceeding 20s.: Provided always, that a copy of such order shall be affixed on all the turnpikes standing on such road, for 30 days at least before the same shall be in force.

13. DESTROYING TURNPIKE GATES, &c.

7 & 8 Geo. 4, c. 80.

Destroying turnpike gate, toll-house, &c.

By 7 & 8 Geo. 4, c. 30, s. 14, if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of

a misdemeanor, and, being convicted thereof, shall be punished accordingly.

See the general clauses of this act, "*Malicious Injuries to Property.*"

By the 119th sect. of the 3 Geo. 4, c. 126, a penalty not exceeding 10*l.* is imposed on persons damaging mile stones, guide posts, or boundary stones. *Ante*, p. 1215.

As to damaging lamps, see the 3 Geo. 4, c. 126, s. 121, p. 1274.

By 4 Geo. 4, c. 95, s. 72, a penalty, &c., is imposed on persons, by damaging tables of tolls, or posts, fences, or other erections put up by the trustees, p. 1276, and see tit. "*Malicious Injuries to Property.*"

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.
Penalty on persons committing nuisances by destroying other things.

4 Geo. 4, c. 95.

14. OTHER INJURIES AND ANNOYANCES.

As, Damaging Bridges, &c., Drawing Timber, Injury to Road, Slaughtering Cattle, Obstructing Passengers, Light in Blacksmiths' Shops, Bonfires, Baiting Bulls, Playing Games, Leaving Waggon, &c., Laying Timber, &c., Running Water, &c., Swine, &c., Leaving Block Stones, &c., Damaging Lamps, &c., Table of Tolls, Posts, Buildings, Drains, Scrapings of Roads, Saw-pits.

By 3 Geo. 4, c. 126, s. 121, if any person or persons shall ride upon any footpath or causeway, by the side of any turnpike road, made or set apart for the use or accommodation of foot passengers, or shall lead or drive any horse, ass, mule, swine, or cattle, or carriage of any description, or any wheelbarrow, truck, or sledge, or any single wheel of any waggon, cart, or carriage apart therefrom, upon any such footpath or causeway (a).

3 Geo. 4, c. 126.
Penalty on persons committing nuisances by riding on foot-paths;

Or shall cause any injury or damage to be done to the same, or the hedges, posts, rails, or fences thereof;

Or shall wilfully pull down or damage any bridge, wall, or any other building or erection made by the trustees or commissioners of any turnpike road, or repaired or repairable by them (b);

or damaging bridge, &c.;

Or shall haul or draw, or caused to be hauled or drawn, upon any part of such turnpike road, any timber, stone, or other thing, otherwise than upon wheeled carriages, or shall suffer any timber, stone, or other thing, which shall be carried principally or in part upon wheeled carriages, to drag or trail upon such road to the prejudice thereof (c);

by drawing timber, &c.;

Or shall use any tipstick, joggle, or other instrument for the purpose of retarding the descent of any cart or other carriage down any hill, in such manner as to destroy, injure, or disturb the surface of any turnpike road;

by injuring the road;

Or shall in or upon such road, or by the side or sides thereof, or in any exposed situation near thereto, kill, slaughter, singe, scald, burn, dress, or cut up any beast, swine, calf, lamb, or other cattle;

by slaughtering of cattle;

Or if any person driving any horse or other beast on the said road, carrying any iron bar or rod, basket or pannier, or any other matter or thing, shall place such bar or rod, basket or pannier, matter or thing, so that the same or any of them shall project more than 30 inches from the side of such horse or other beast, or so as in any manner to obstruct or impede the passage of any person, or any horse, beast, or carriage travelling along such turnpike road;

by obstructing passage of travellers;

(a) As to riding, &c., on footpaths, see the further and more extensive provision of the 7 & 8 Geo. 4, c. 24, s. 16, p. 1265. Most of the acts enumerated in this section are nuisances at common law.

(b) See the 4 Geo. 4, c. 95, s. 72, p. 1275.

(c) A rough sort of sledge is not a

wheel carriage within this clause; but to make a person liable under this section for using such a vehicle, it must be shown to be loaded with something of the nature of timber or stone, not with straw. (*Commissioners of Radnorshire Roads v. Evans*, 32 L. J. M. C. 100.)

10. *Injuries, nuisances, &c.*

3 Geo. 4, c. 126.

by encamping on
sides of road;
by light of black-
smiths' shops;

by making bon-
fires;

by baiting bulls,
playing at foot
ball, or other
games;

by leaving wag-
gon, &c.;

by laying timber,
&c.;

by running of
water or filth;

by swine;

by leaving block
stones, &c.,

or by damaging
lamps.

Penalty.

4 Geo. 4, c. 95.
Wilfully injuring
table of tolls.

Posts, &c., by
gravel pit.

Or if any hawker, higgler, gipsy, or other person or persons travelling with any machine, vehicle, cart, or other carriage, with or without any horse, mule, or ass, shall pitch any tent, booth, stall, or stand, or encamp upon or by the sides of any part of any turnpike road;

Or if any blacksmith, or other person occupying a blacksmith's shop situate near any turnpike road, and having a window or windows fronting the said road, shall not, by good and close shutters, every evening after it becomes twilight, bar and prevent the light from such shop shining into or upon the said road;

Or if any person or persons shall make or assist in making any fire or fires, commonly called bonfires, or shall set fire to or wantonly let off or throw any squib, rocket, serpent, or other firework whatsoever, within 80 feet of the centre of such road;

Or bait or run for the purpose of baiting any bull, or play at football, tennis, fives, cricket, or any other game or games upon such road, or on the side or sides thereof, or in any exposed situation near thereto, to the annoyance of any passenger or passengers;

Or if any person shall leave any waggon, wain, cart, or other carriage whatever upon such road, or on the side or sides thereof, without any proper person in the sole custody or care thereof, longer than may be necessary to load or unload the same, except in cases of accident, and in cases of accident for a longer time than may be necessary to remove the same, or shall not place such waggon, wain or other carriage during the time of loading or unloading the same, or of taking refreshment, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto;

Or shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon such road, or on the side or sides thereof, or the footpaths or causeways adjoining, to the prejudice of such road or footways, or to the prejudice, annoyance, interruption, or personal danger of any person or persons travelling thereon;

Or shall suffer any water, filth, dirt, or other offensive matter or thing whatsoever, to run or flow into or upon such road or footpaths, from any house, building, erection, lands, or premises adjacent thereto;

Or if any person driving any pigs or swine upon such road, shall suffer such pigs or swine to root up or damage such road, or the fences, hedges, banks, or copse on either side thereof respectively;

Or if any person shall, after having blocked or stopped any cart, waggon, or other carriage in going up a hill or rising ground, cause or suffer to be or remain on such road the stone or other thing with which such cart or other carriage shall have been blocked or stopped;

Or if any person or persons shall pull down, damage, injure, or destroy any lamp or lamp-post put up, erected, or placed in or near the side of any turnpike road or toll house erected thereon, or shall extinguish the light of any such lamp;

Every person offending in any of the cases aforesaid, shall, for each and every such offence, forfeit and pay any sum not exceeding 40s. over and above the damages occasioned thereby.

By stat. 4 Geo. 4, c. 95, s. 72, if any person or persons whomsoever shall wilfully pull down, break, injure, or damage any table of tolls put up or fixed at any toll-gate or bar on any part of any turnpike road, or wilfully or designedly deface or obliterate any of the inscriptions, letters, figures, or marks thereon;

Or if any person or persons shall wilfully pull up, throw down, break, injure, or damage any posts, rails, or fences, placed or to be placed or put up by order of any trustees or commissioners of any

turnpike road, or their surveyor or surveyors, either by the side or sides of such road, or at or near to any pit or quarry which shall be used, opened, or made for the getting of stones, gravel, or other materials for the purposes thereof, in order to prevent accidents;

Or if any person or persons shall wilfully cause any damage or injury to be done to any bridge, arch, wall, or other building or erection to be set up or erected by virtue of any act on any part of any turnpike road, or by the side or sides thereof;

Or if any person or persons shall cast or throw any earth or rubbish, or other matter or thing, into any drain, ditch, culvert, tunnel, or other watercourse, made by virtue of any act, so as to obstruct the water from running or draining off any turnpike road;

Or if any person or persons shall, without being thereto authorised by the surveyor or surveyors for the time being acting under any act, shovel up, scrape, gather, or carry away any stones, gravel, sand, or other materials, slutch, dirt, mire, drift, or soil from off any footpath or causeway, or any other part of such road;

Or if any person shall in any manner wilfully prevent any other person or persons from passing him or her, or any carriage under his, her, or their care, upon any such road;

Or if any such person shall dig, make, or use any pit or pits for sawing of timber or wood within 30 feet of the centre of any such turnpike road, unless where inclosed by a fence from any such road;

Every person offending in any of the cases aforesaid shall forfeit and pay a sum not exceeding 40s. for every such offence; and one moiety of such penalties shall be paid to the informer, and the other moiety thereof shall be paid to the treasurer of the trustees or commissioners of such turnpike road, and applied towards the repair of such road.

The 27 & 28 Vict. c. 75, "An Act to amend the law relating to certain nuisances on turnpike roads," after reciting 5 & 6 Will. 4, c. 50, s. 70, enacts by sect. 1, that it shall not be lawful for any person to erect or cause to be erected, or to use, any steam engine, gin, or other like machine, within the distance of 25 yards from any part of any turnpike road, unless such steam engine, gin, or other like engine shall be within some house or other building, or behind some wall, fence, or screen sufficient to conceal or screen the same from the said road, so that the same may not be dangerous to passengers, horses, or cattle; and in case any person shall offend in any of the cases aforesaid every such person so offending shall forfeit and pay any sum not exceeding 5*l.* for every day during any part of which such steam engine, gin, or engine shall be permitted to continue, contrary to the provisions of this act; which said penalties shall be levied, recovered, and applied in such and the same manner as any penalty or forfeiture for any other offence on any turnpike road may be levied, recovered, and applied; but no penalty shall be incurred under this section in respect of any locomotive engine travelling according to law on any public railway, turnpike road, or other highway.

11. *Penalty for hindering execution of Act, &c.*

4 Geo. 4, c. 95.
Buildings, &c.

Casting rubbish into drains.

Scrapings of road.

Obstructing passengers.

Saw-pits.

Penalty, 40s.

27 & 28 Vict. c. 75.
5 & 6 Will. 4, c. 50,
s. 70, extended to
turnpike roads.

XI. Penalty for hindering Execution of Act, Assaulting Collector, &c.

If any constable, or any officer with salary, neglect to put this act into execution, he is liable to a penalty. See *ante*, p. 1248.

By 3 Geo. 4, c. 126, s. 139, in case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this act, or any particular act made for amending any turnpike road, or shall assault any surveyor, or any collector or collectors of the tolls, in the execution of his or their office

3 Geo. 4, c. 126.
Persons resisting
execution of act,
or assaulting col-
lectors to forfeit
not exceeding 10*l.*

14. *Property in or offices, or shall pass through any turnpike gate or gates, rail or indictments, &c.* rails, chain or chains, or other fence or fences set up or to be set up by authority of parliament, without paying the toll appointed to be paid at such gate or other fence, or shall *hinder or make any rescue of cattle or other goods distrained by virtue of this act, every such person offending therein shall, for every such offence, forfeit any sum not exceeding 10%, at the discretion of the justice or justices of the peace before whom he or she shall be convicted.

3 Geo. 4, c. 126.
Passing through
gate without
paying toll.

* *Sic.*

See further, as to the penalty for evading of tolls, &c., *ante*, p. 1247.

In the case of *Reg. v. Irving*, 12 Q. B. 429, the court was equally divided upon the point whether this section applied to a person passing through a turnpike gate without paying toll, but offering no violence, and believing that he was exempt.

XII. Apprehension of Transient Offenders.

For securing transient offenders.

By 3 Geo. 4, c. 126, s. 140, reciting, that offences may be committed against this act, or other acts for repairing and maintaining turnpike roads, by persons unknown to the collectors or other officers; it is enacted, that it shall be lawful for any of the trustees or commissioners of any turnpike road, or their clerk or clerks, or their collectors, surveyors, or other officers respectively, and such other person or persons as he or they shall call to his or their assistance, without any warrant or other authority than this act, to seize and detain any unknown person or persons who shall commit any such offence or offences, and take him, her, or them, before any justice of the peace for the county, district, or place near to the place where the offence or offences shall be committed, or such offender or offenders shall be seized and apprehended; and such justice and justices shall, and is and are hereby required to proceed and act with respect to such offender or offenders, according to the provisions of this or any other acts for repairing turnpike roads.

XIII. Trustees, &c., may direct Prosecutions.

Trustees or commissioners may direct prosecutions for nuisances, &c.

By 3 Geo. 4, c. 126, s. 133, the trustees or commissioners of any turnpike road, at a public meeting, may, and they are hereby empowered, if they think fit, to direct prosecutions by indictment, or otherwise, against the offender or offenders for any nuisance or other offence done, committed, or continued in or upon any of the turnpike roads under their care respectively, or to recover any penalty or forfeiture incurred under the provisions of this or any other turnpike act, at the expense of the revenues belonging to such turnpike roads, to be allowed by such trustees or commissioners at some subsequent meeting.

XIV. Property in Indictments, &c., to be laid in Trustees.

7 Geo. 4, c. 64.
Property of turnpike trustees may be laid in the trustees.

By 7 Geo. 4, c. 64, s. 17, with respect to property under turnpike trusts, it is enacted, that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine lamp, board, stone, post, fence, or other thing, erected or provided in pursuance of any act of Parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.

If a person employed by a trustee of turnpike tolls to collect them, lives in the toll house rent free, the property in the house, in an indictment for burglary, may be laid in the person so employed by the lessee, he having the exclusive possession, and the toll house not being parcel of any premises occupied by his employer. (*R. v. Camfield*, *R. & M. C. C. R.* 42.)

15. *Recovery and application of penalties.*

XV. Recovery and Application of Penalties.

By 4 Geo. 4, c. 95, s. 83, in all cases in which, by the said recited act [3 Geo. 4, c. 126], any penalty or forfeiture, by that or any other act or acts for making or maintaining any turnpike road imposed, is made recoverable by information before a justice of the peace, it shall and may be lawful for any justice (a) of the peace to whom complaint shall be made of any offence against any such act, or the said recited act, or this act, to summon the party complained against before him, and, on such summons to hear and determine the matter of such complaint, and, on proof of the offence, to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed to recover the same although no information in writing shall have been exhibited or taken by or before such justice; and all such proceedings by summons without information shall be as good, valid, and effectual to all intents and purposes, as if an information in writing was exhibited.

4 Geo. 4, c. 95.
Justices may proceed by summons in the recovery of penalties.

No information in writing necessary.

By the 3 Geo. 4, c. 126, s. 141, all penalties, forfeitures and fines, by this act inflicted or authorised to be imposed (the manner of levying and recovering and applying whereof is not herein otherwise directed), shall, upon proof and conviction of the offences respectively, before any justice of the peace for the county, riding, or place where the offence shall have been committed, (as the case may require,) either by the confession of the party offending, or by the oath of any credible witness or witnesses (b), (which oath such justice is in every such case hereby fully authorised to administer), be levied, together with the costs attending the information and conviction, by distress and sale of the goods and chattels of the party or parties offending, by warrant under the hand and seal of such justice (which warrant such justice is hereby empowered and required to grant), and the overplus (if any) after such penalties, forfeitures, and fines, and the charges of such distress and sale are deducted, shall be returned, upon demand, unto the owner or owners of such goods and chattels; and in case such fines, penalties, and forfeitures, shall not be forthwith paid upon conviction, then it shall be lawful for such justice to order (c) the offender or offenders, so convicted to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security, to the satisfaction of such justice, for his or their appearance before such justice, on such day or days as shall be appointed for the return of such warrant of distress, such day or days not being more than 7 days from the time of taking any such security, and which security the said justice is hereby empowered to take by way of recognizance or otherwise (d); but if upon the return of such warrant it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for any such justice of the peace as aforesaid, and he is hereby authorised and required, by warrant or warrants, under his hand and seal, to cause such offender

3 Geo. 4, c. 126.
Recovery and application of penalties.

Distress and sale.

Commitment.

(a) A justice may act though a trustee or creditor, *ante*, p. 1161.
(b) As to such witnesses, see p. 1282.

(c) This order may be by parol. (*Still v. Watts*, 7 East, 533.)
(d) See stat. "Distress under Justice's Warrant."

15. *Recovery and application of penalties.*

3 Geo. 4, c. 126.

Application of penalty.

4 Geo. 4, c. 95.

Damages and charges in case of disputes to be settled by justices in addition to penalties.

3 Geo. 4, c. 126.

Penalties when recoverable by action, &c. (a).

* *Sic.*

Notice of action (b).

or offenders to be committed to the common gaol or house of correction of the county, riding or place where the offender shall be or reside, there to remain without bail or mainprize, for any time not exceeding three calendar months, unless such penalties, forfeitures, and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied; and the monies arising by such penalties, forfeitures, and fines respectively, when paid or levied, if not otherwise directed to be applied by this act, shall be from time to time, paid, one moiety thereof to the informer or person suing for and recovering the same, and the other moiety to the treasurer or treasurers to the trustees or commissioners for repairing and maintaining the road on which such offence shall have been committed, and applied and disposed of for the purpose of such road, and of this act.

Stat. 4 Geo. 4, c. 95, s. 69, enacts, that where by that act, or by stat. 3 Geo. 4, c. 126, or any act for making or maintaining any turnpike road, any damages or charges are directed or authorised to be paid or recovered, in addition to any penalty or penalties for any offence or offences, the amount of such damages or charges in case of dispute respecting the same, shall be settled, ascertained, and determined by the justice or justices of the peace by or before whom any offender shall be convicted of any such offence or offences, who is hereby authorised and required, on non-payment thereof, to levy such damages or charges by distress and sale of the offender's goods and chattels, in manner directed by the said recited act [3 Geo. 4, c. 126], for the levying of any penalties or forfeitures.

By stat. 3 Geo. 4, c. 126, s. 143, every prosecutor or informer shall sue for and recover any forfeiture or penalty imposed by this or any other act or acts of Parliament made for erecting turnpikes or for repairing and amending turnpike roads, in the manner hereinafter mentioned; (that is to say), if the same shall exceed the sum of 20*l.* or upwards,* it shall be recoverable by action (a) of debt in any of his Majesty's courts of record, in which it shall be sufficient to declare that the defendant is indebted to the plaintiff in the sum of , being forfeited by 3 Geo. 4, intituled an act [*here set forth the title of this act, if the offence shall be committed under it, or, "an act," &c., setting out the title of the act under which the penalty shall be claimed*]; and the plaintiff, if he recover in any such action, shall have full costs, provided that there shall not be more than one recovery for the same offence, and that 21 days' (b) notice (c) be given to the party offending, pre-

(a) A prosecution for a penalty is the only mode of proceeding against a collector for extortion; no action lies.

The General Turnpike Act (13 Geo. 3, c. 84, s. 13), having given a penalty to be recovered by information before justices of the peace, or by action for using a greater number of horses than is thereby allowed for the draught of waggons, &c., on the roads, and the 19th section having provided, that if it appear on oath, to the satisfaction of any justice of the peace, or court of justices, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, such justice of peace or Court may stop all proceedings before them respectively; it was held, that such application for a stay of proceedings must be made to the Court in which

the action was brought, and that the defence is not available at *Nisi Prius*. (*Robinson v. Pocock*, 11 *East*, 484.)

(b) But a calendar month's notice of action is requisite, since the passing of the 5 & 6 *Vict.* c. 97, s. 4.

(c) A. having contracted with the trustees of a turnpike road to repair the road for a specific sum, B., one of the trustees, let out to A. his horse and cart for 5*s.* a day, and they were used in the repair of the road. In debt against B. for penalties under the 3 Geo. 4, c. 126, s. 65, it was held, that the notice of action, not stating that B., when he let out his horse and cart, was acting as a trustee, was bad; and also, that the notice being bad, the plaintiff was barred, not only of his right to costs, but of his right to sue. (*Towsey v. White*, 5 *B. & C.* 125.)

vicious to the commencement of such action, and that the same be brought and commenced within 3 calendar months after the offence for which such action is brought shall have been committed; and if such penalty or forfeiture shall not exceed the sum of 20*l.*, and shall be more than 5*l.*, the same shall be recoverable only by information before a justice of the peace, subject to appeal in manner hereinafter mentioned; and if such penalty or forfeiture shall not exceed the sum of 5*l.*, the same shall in like manner be recoverable only by information before a justice of the peace, and no writ of certiorari to remove the same shall be allowed.

Sect. 54. In case any toll collector or person acting as such shall offend against any of the provisions of this act, whereby any penalty shall be incurred, and shall abscond or absent himself so as not to be found, then it shall and may be lawful for any justice of the peace before whom any such toll collector or person shall have been convicted of any such offence, in case of such collector or other person absconding after conviction, or in case of his or her absconding previous to conviction, then for any other justice of the peace acting for the county, on an examination of the circumstances, and ascertaining, by the examination of witnesses, that such offence has been committed by the person absconding to order and adjudge that the penalty incurred as aforesaid shall be paid by the lessee or farmer of the tolls under whom such collector or other person shall act; all which penalties shall be levied and recovered from such lessee or farmer, and applied in manner hereinafter directed.

As to irregularity in distresses, &c., see *infra*.

Sect. 137. No conviction shall be had or made by virtue of this act, unless upon the view of a justice convicting, or on confession of the party accused, or upon the oath of one or more credible witness or witnesses.

See further as to witnesses and evidence, p. 1281.

By 9 Geo. 4, c. 77, s. 18, no person or persons shall or may be convicted of any offence or offences contrary to the provisions of this act, or of the said recited acts [3 Geo. 4, c. 126, 4 Geo. 4, c. 95, and 7 & 8 Geo. 4, c. 24], or of any local turnpike act, in a summary way, before any justice or justices of the peace, after the expiration of 6 months from the time when any such offence or offences shall or may have been committed.

XVI. Actions, Limitation of; Tender of Amends; and Costs.

As to when trustees are personally liable, and may be sued, see p. 1177.

As to when they may sue and how, see p. 1177.

As to actions by trustees for subscriptions, see p. 1180.

As to when surveyors and other officers may be sued, see p. 1186.

As to actions against mortgagees for continuing in possession after debt satisfied, see p. 1255.

As to actions for extortion, see p. 1189.

As to actions for a special injury by obstruction, see p. 1066.

As to actions for penalties, and the notice and limitation thereof, see p. 1279.

As to evidence and witnesses, see p. 1281.

By 3 Geo. 4, c. 126, s. 144, where any distress shall be made for

A notice of action under an act of Parliament against a toll-gate keeper, "for demanding and taking of the plaintiff toll for, and in respect of, certain matters and things particu-

larly mentioned, and exempted from the payment of toll in and by a certain act of Parliament, intituled, &c.," —is uncertain and bad. (*Freeman v. Line, Chit. Rep.* 672.)

16. *Actions, &c. and costs.*

3 Geo. 4, c. 126.

Limitation of.

When recoverable only by conviction.

Certiorari.

If toll collectors abscond, penalties to be levied on lessees of tolls.

Irregularity in distress, &c.

Conviction to be on view of justice, or on oath or confession.

9 Geo. 4, c. 77.

And within six months from time of offence.

By and against trustees.

Officers.

Mortgages.

Extortion.

Special injuries.

Penalties.

3 Geo. 4, c. 126.

Evidence and witnesses.

16. <i>Actions, &c. and costs.</i>	any sum or sums of money to be levied by virtue of this act, or any other act for repairing, amending, or maintaining any turnpike road, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any default or want of form in any proceeding relating thereto, nor shall the party or parties distraining be deemed a trespasser or trespassers <i>ab initio</i> , on account of an irregularity which shall be afterwards done in making the distress; but the person or persons aggrieved by such irregularity may recover satisfaction for the special damage in an action on the case: Provided always, that no plaintiff or plaintiffs shall recover in any action for such irregularity, trespass or wrongful proceedings, if tender of sufficient amends (a) shall be made by or on behalf of the party or parties who shall have committed or caused to be committed any such irregularity or wrongful proceedings, before such action brought; and in case no such tender shall have been made, it shall and may be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he or they shall see fit; whereupon such proceedings, or orders and judgment shall be had, made, and given in and by such court as in other actions, where the defendant is allowed to pay money into court.
3 Geo. 4, c. 126. Distress not unlawful <i>ab initio</i> .	
Action on the case given.	
Tender of amends (a).	
Limitation of actions.	Sect. 147. If any action or suit shall be commenced against any person or persons for any thing done in pursuance of this act (b), then, and in every such case, such action or suit shall be commenced or prosecuted within 3 months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere (c); and the defendant or defendants in every such action or suit shall and may plead the general issue, and at the trial thereof give this act and the special matter in evidence; and if the matter or thing complained of shall appear to have been done under the authority and in execution of this act, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought and laid in any other county or place than as aforementioned, then the jury shall find for the defendant or defendants; and if the plaintiff shall become nonsuit, or discontinue his or her action
Venue local.	
General issue.	

(a) Under the Highway Act, 13 Geo. 3, c. 78, in which powers for getting materials are given to the surveyors, it was held, that where surveyors had made a new way to carry materials, and, after action brought, had paid money into Court as amends, the sufficiency of such amends could not be questioned at *Nisi Prius*, but ought to have been ascertained by justices of peace. (*Boylefield v. Porter*, 13 East, 200.)

(b) See the cases and decisions under the Highway Act, *ante*, p. 1092. (And see *Kemp v. Burt*, 4 B. & Adol. 424; *Charlesworth v. Rudgards*, 1 Cr. M. & R. 896; and *Whitehouse v. Fellows*, 30 L. J. C. P. 305, and *ante*, p. 1092.)

(c) See *Basing v. Skelton* (5 T. R. 16; 1 C. M. & R. 245). Where a statute enacted, "that no action should be commenced against any person, for anything done in pursu-

ance of the act, until 21 days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof made to the party aggrieved, or after 6 calendar months next after the fact committed, and that every such action should be brought in the county or place where the matter should arise, and not elsewhere, and the defendant should and might at his election plead specially, or the general issue not guilty, and give evidence that the same was done in pursuance and by the authority of that act." In *assumpsit* against the toll collector, to recover the amount of tolls improperly collected by him:—Held, that the venue should have been laid in the county where the tolls are collected, and that the defendant was entitled to 21 days' notice of action. (*Waterhouse v. Keen*, 4 B. & C. 200.)

after the defendant shall have appeared, or have a verdict against him or her, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant or defendants hath or have in any cases by law.

But by the 5 & 6 Vict. c. 97, ss. 2 & 4 (*ante*, p. 1093, n. (c)), in actions, &c. commenced after the passing thereof, instead of these treble costs, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer.

By 4 Geo. 4, c. 95, s. 61, in case any action, suit, or prosecution, shall be brought or commenced against any such trustee or commissioner, for any thing done by virtue or in pursuance of the said recited act, 3 Geo. 4, c. 126, or this act, or any such act for making or maintaining any turnpike road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the tolls arising on the turnpike road for which such trustee or commissioner shall act. (See *Wormwell v. Hailstone*, 6 Bing. 668; *ante*, 1177.)

A notice of action is required, when proceeding against an offender for a penalty, *ante*, p. 1280; but not in other cases, except against a magistrate.

17. Evidence, witnesses, and oaths.

Costs.

5 & 6 Vict. c. 97.

4 Geo. 4, c. 95.

Costs of trustees.

Notice of action.

XVII. Evidence, Witnesses, and Oaths (a).

By 3 Geo. 4, c. 126, s. 72, all orders and proceedings of the trustees or commissioners of every turnpike road, together with the names of the trustees or commissioners present at every meeting, shall be entered in a book or books to be kept by the clerk to the said trustees or commissioners for that purpose, and be signed by the chairman of (b) the meeting or meetings at which such orders or proceedings shall be from time to time made or had; and that such book or books shall be open at all seasonable times to the inspection of any of the trustees or commissioners (c), without fee or reward; and such orders and proceedings, so entered and signed by the chairman of such meeting or meetings as aforesaid, shall be deemed and taken to be original orders and proceedings; which said book or books, as well as the book or books in which the oath or affirmation directed to be taken by the said trustees or commissioners shall be entered, and also the book or books directed to be kept for registering mortgages and assignments, and all entries in such books respectively, shall and may be read in evidence in all courts whatsoever, in all cases of appeal, and in all prosecutions, suits, and actions whatsoever (c).

The 9 Geo. 4, c. 77, after repealing so much of 4 Geo. 4, c. 95, as enacts, that books of account and proceedings shall be received as evidence, enacts, by s. 2, all books kept for registering mortgages or assignments, and all entries therein, and all books containing the accounts and proceedings of the trustees in the execution of any local turnpike act, kept according to the directions and provisions of any such act, or of the said recited act, 3 Geo. 4, c. 126, or of this act, and made evidence thereby, shall be admitted in evidence in all courts, and by all judges, justices, and others, without proving the facts

3 Geo. 4, c. 126.

Order and proceedings to be entered in books, which shall be open for inspection.

Books to be evidence.

9 Geo. 4, c. 77.

Books of accounts and proceedings to be received in evidence, without proving their contents, notwithstanding the act under which they have been kept is repealed; and to be open to inspection.

(a) See in general as to evidence, witnesses, and oaths, *ante*, tit. "Evidence," and *post*, tit. "Oaths."

(b) See *The London and Birmingham*

ham Railway Company v. Fairclough, 3 Scott, N.R. 68.

(c) See *ante*, p. 1168.

17. Evidence,
witnesses, and
oaths.

therein contained, unless such facts, or any of them, shall be first controverted, notwithstanding any former act, under the provisions of which such books may have been originally kept, may be repealed; and all such books shall be preserved and kept by the clerk for the time being of such trustees, and shall at all seasonable times be open to the inspection of the said trustees, and of any creditor or creditors of the tolls, without fee or reward; and the said trustees and creditors, or any of them, shall and may take copies or extracts from the said book or books, or any part or parts thereof respectively, without paying any thing for the same; and in case the clerk to the said trustees shall refuse to permit, or shall not permit, the said trustees, or such creditors, or any of them, to inspect the said book or books, or to take such copies or extracts as aforesaid, such clerk shall forfeit and pay any sum of money not exceeding 5*l.* for every such offence.

3 Geo. 4, c. 126.

By 3 Geo. 4, c. 126, s. 73, *ante*, p. 1169, a like penalty is imposed for the non-production of books of account.

If action be
brought against a
trustee, evidence
of his being ap-
pointed and acting
sufficient.

By 3 Geo. 4, c. 126, s. 134, in all cases where any action shall be brought by or against any trustee or trustees, or commissioner or commissioners of any turnpike road, evidence of such trustee or trustees, commissioner or commissioners, having acted as such, together with the act of Parliament by which he or they was or were appointed, or the order, or a copy of the order for his or their appointment or election, in case he or they was or were appointed or elected by the trustees or commissioners, shall be sufficient proof of his or their being a trustee or trustees, commissioner or commissioners. (See *ante*, p. 1180.)

It has been held, that the words in this enactment, *in case he was appointed or elected by the trustees*, apply to cases where there has been an appointment or election *de facto* by the trustees, in contradistinction to an appointment by the Road Act; and therefore proof of a party having acted as trustee, and of an order made by the trustees for his appointment or election, is sufficient; and it would be so even under a local act, whereby the appointment of new trustees on death or removal was required to be under the hands and seals of 5 of the old trustees, and although it was shown that the order for such appointment was not so made. (*Doe d. Baggaley v. Hares*; 4 B. & Ad. 435.)

If a person be named in a turnpike act as one of the trustees, and has acted as such, and been recognised as a trustee by the plaintiff, the judge, at a trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to show that the person has not taken the oath prescribed by the 3 Geo. 4, c. 126, s. 62, to be taken by trustees of the road, before they act as such. (*Pritchard v. Walker*, 3 C. & P. 212.)

3 Geo. 4, c. 126.

By 3 Geo. 4, c. 126, s. 64, *ante*, p. 1160, if a person be sued for acting as trustee without being qualified, the proof of qualification lies on him.

Proof of exemp-
tion from toll.

Sect. 36. If any person or persons shall, by any fraudulent or collusive means whatsoever, claim or take the benefit of any exemption from toll or from overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this act contained, every such person shall, for every such offence, forfeit and pay any sum not exceeding 5*l.*; and, in all cases, the proof of exemption shall be upon the person claiming the same. (And see 2 & 3 Vict. c. 47, s. 10; and 3 & 4 Vict. c. 88.)

Penalty on wit-
nesses not attend-
ing when sum-
moned, not ex-
ceeding 40*s.*

By 3 Geo. 4, c. 126, s. 138, if any person or persons, after having been paid or tendered a reasonable sum of money for his, her, or their costs, charges, and expenses, shall be summoned as a witness or witnesses to give evidence before any justices* of the peace, touching any matter of fact contained in any information or complaint for any

* *Sic.*

offence against any act of Parliament relating to turnpike roads, or this act, either on the part of the prosecutor or the person or persons accused *, shall refuse or neglect to appear at the time and place for that purpose appointed, without a reasonable excuse for his, her, or their refusal or neglect, or appearing shall, (after having been paid or tendered a reasonable sum for his costs, charges, and expenses,) refuse to be examined upon oath, and give evidence before such justice of the peace, then, and in either of such cases, such person shall forfeit, for every such offence, any sum not exceeding 40s.

As to witnesses, see "*Evidence*" and "*Oaths*."

Oaths.]—By 3 Geo. 4, c. 126, s. 146, where any oath or affirmation is by this or any act relating to any turnpike road required and directed to be made or taken, the justices of the peace of any county or place, or the trustees or commissioners of any turnpike road, (as the case may be,) and according to the several jurisdictions herein given to them respectively as aforesaid, shall, and they are hereby respectively empowered to administer the same.

19. *Appeal and certiorari.*

* *Sic.*

Power to administer oaths.

XVIII. Forms of Proceedings.

By 3 Geo. 4, c. 126, s. 148, the forms of proceeding relative to the several matters contained in this act, which are set forth and expressed in the schedule hereunto annexed, may be used upon all occasions, with such additions and variations only as may be necessary to adapt them to the particular exigencies of the case, and that no objection shall be made or advantage taken for want of form in any such proceedings by any person or persons whomsoever (*a*).

Forms in the schedule annexed to be used.

XIX. Appeal and Certiorari.

By 4 Geo. 4, c. 95, s. 87, if any person shall think himself or herself aggrieved by any order, judgment, or determination made, or by any matter or thing done by any justice or justices of the peace, or by any trustees or commissioners of any turnpike road (*b*) in pursuance of this act, or the said recited act [3 Geo. 4, c. 126], or any local act for making, repairing, or maintaining any turnpike road, (except where the order, judgment, or determination of any such justice or justices, trustees or commissioners, are hereby declared to be final and conclusive, and except under the particular circumstances hereinafter mentioned,) and for which no particular method of relief hath been already appointed, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to such justice, commissioner, or trustee, by whose act or acts such person shall think himself or herself aggrieved, notice in writing (*c*) of his or her intention to bring such appeal, and of the matter thereof, within 6 days after the cause of such complaint shall arise, and within 4 days after such notice entering into recognizances before some justice of the peace, with 2 sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the

4 Geo. 4, c. 95.

Persons aggrieved may appeal to quarter sessions.

Notice of appeal.

Recognizance.

(*a*) See *ante*, p. 1172, as to the effect of the 9 Geo. 4, c. 77, ss. 6 and 7.

(*b*) This appeal clause applies only to things done by justices, trustees, or commissioners, not to an act done by a jury. (*R. v. Trustees of Norwich Roads*, 5 A. & E. 563.)

(*c*) Form No. 120, *post*. By the

12 & 13 Vict. c. 45, in every case of appeal (except in certain excepted cases, not including highways) to any court of general or quarter sessions, 14 clear days' notice of appeal at the least is to be given: such notice of appeal is to be in writing, duly signed. See "*Appeal*."

19. *Appeal and certiorari.*
 4 Geo. 4, c. 95.

Costs.

Proceedings not to be removed by certiorari (a).

Notice of appeal.

Who may appeal, &c.

justices at such general or quarter sessions, and also to pay the penalty or forfeiture in case the conviction should be affirmed; and each and every justice of the peace, commissioner, or trustee, having received notice of such appeal as aforesaid, shall return all proceedings whatever had before him respectively, touching the matter of such appeal, to the said justices at their general or quarter sessions aforesaid; and the said justices at such sessions, upon due proof of such notice having been given as aforesaid, and of such recognizance having been entered into in manner before directed, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against as they the said justices shall think proper, to be levied and recovered by distress and sale of the goods and chattels of the person or persons against whom such determination shall be given, and the determination of such general or quarter sessions shall be final and conclusive to all intents and purposes; and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster; any law or statute to the contrary notwithstanding: Provided always, that in case there shall not be time to give such notice, and enter into such recognizances as aforesaid, before the next sessions to be holden after the conviction of the appellant, then, and in every such case, such appeal may be made to the next following sessions, and shall be there heard and determined: Provided always, that no appeal shall be allowed against any conviction for any penalty or forfeiture which shall not exceed the sum of 40s.

Where a conviction, under the above act, took place on Monday, the 2nd of May, a notice of appeal served on the following Monday, the 9th of May, was held too late. (*R. v. Justices of Middlesex, 2 Dowl., N. S., 719.*) Quære, whether the notice can be served on a Sunday? (*S. C.*)

In *R. v. Justices of Southampton, (K. B. Michaelmas Term, 29th November, 1830.)* it was questioned whether, as this act directs the notice of appeal to be given to the justices, &c., the word "parties" does not mean such justices. But the Court held the word "parties" to mean the "prosecutor and defendant;" and the prosecutor in that case having failed in his appeal, the justices, having refused to issue their warrant of distress against him for the costs, were ordered by mandamus to issue it.

An appeal against a conviction, under the above act, came on to be heard on the 6th of July, when it was adjourned, in consequence of the press of business at the sessions. At the next appeal day, on the 7th of August, it was again adjourned by consent of counsel:—Held, notwithstanding, that the respondents, on a subsequent appeal day, were entitled to call for proof of the original notice of appeal, or to object to the sufficiency of such notice. (*R. v. Justices of Middlesex, supra.*)

In *R. v. Justices of Hants, (1 B. & Ad. 654.)* it was held, that a party convicted under the Turnpike Act (4 Geo. 4, c. 95,) of having taken too large a toll, and adjudged to pay a penalty of 41s., might appeal to the quarter sessions. It was also held, on an appeal by a party convicted, that the informer was the "party appealed against," within the meaning of the above 87th section; and justices having

(a) This enactment only applies to proceedings expressly pointed out by the act, and does not apply to proceedings taken under another act recognised by this act: therefore the en-

actment is not applicable to proceedings taken in pursuance of 3 Geo. 4, c. 126. (*R. v. Trustees of Norwich and Watton Road, 5 A. & E. 563.*)

ordered him to pay 10*l.* for costs, the Court granted a mandamus to them to issue a warrant for levying the same on the goods of the informer.

The sessions, on appeal against a certificate of two justices, that a turnpike road, made under a local act, had been completed and was fit to be travelled upon, having decided that the certificate was void in point of law, and having refused to go into the merits of the appeal in point of fact, the Court of K. B. refused to grant a mandamus to them to hear the appeal, on the ground that their decision was contrary to the local act. (*R. v. The Justices of the W. R. of Yorkshire*, 5 *B. & Adol.* 1003.)

A rule nisi for a mandamus to compel justices to enter continuances and hear an appeal against a conviction under the 4 Geo. 4, c. 95, having been obtained, it was held, that it was no objection to counsel appearing to show cause, that they were instructed by the attorneys of the trustees of the road on which the offence was alleged to have been committed by the applicant, and not by the justice before whom, or the informer by whom, the complaint was made on which the conviction took place, and to whom respectively the rule was addressed. (*R. v. Justices of Middlesex*, 2 *Dowl., N. S.*, 719.)

See the observations as to appeals and certiorari under the highway acts. As to appeals and certiorari in general, see "*Appeal*," "*Certiorari*," and see a further provision as to certiorari in the 3 Geo. 4, c. 126, s. 143, p. 1279.

20. *Consent to turnpike bill may be by affidavit.*

Mandamus to hear appeal.

XX. Consent to Turnpike Bill may be by Affidavit.

By stat. 3 Geo. 4, c. 126, s. 151, all persons concerned or interested in any bill for making or repairing any turnpike road, or for widening or diverting such road, may signify their consent to the same by affidavit, taken and authenticated according to the form hereinafter prescribed, unless the committee of either house of Parliament to whom such bill, or the petition of such bill, shall be referred, shall otherwise order.

Sect. 152. It shall and may be lawful for any one or more justice or justices of the peace, or master or masters extraordinary in Chancery to take affidavits on oath or affirmation (which oath or affirmation such justice or justices, or master or masters extraordinary in Chancery, is and are hereby authorised and empowered to administer) of the answers that may be given by the owners and occupiers of lands on applications made to them for their consent to such bill, and every affidavit shall be in the form following, as near as the circumstances of the case will admit:

"A. B., of _____, maketh oath and saith, that he did apply to C. D., who he believes to be the owner of [set out the property], being part of the lands through which the intended turnpike road from E. to F. is to be carried, or the alteration to be made (as the case may be), and that he received from such owners the answers set forth in the paper hereunto annexed.

(Signed) A. B.

"Sworn [or, solemnly affirmed] before me [as in the other forms hereinbefore set forth.] As witness my hand and seal."

And no such affidavit as aforesaid shall be subject or liable to any stamp duty now payable by any act or acts of Parliament, or which shall hereafter be imposed, unless specially named and made subject thereto by the act or acts of Parliament imposing the same.

Sect. 153. Proof of the hand-writing of any justice of the peace, or master extraordinary in Chancery, before whom any such affidavit shall be made as aforesaid, shall be sufficient evidence of the signature of such justice or master extraordinary before any committee of either House of Parliament, without any witness being produced who was present at the time when such affidavit was made, and without a wit-

3 Geo. 4, c. 126.

Parties interested may signify their consent to any turnpike bill by affidavit.

Justices of peace or masters extraordinary in Chancery empowered to take all such affidavits.

Affidavit not liable to stamp duty.

Proof of hand-writing of justice to be deemed sufficient.

21. *Forms—list of.*

ness being produced to prove that such justice of the peace, or master extraordinary in Chancery, before whom such affidavit was made, was at the time of making such affidavit a justice of peace or master extraordinary in Chancery.

See the 16 & 17 Vict. c. 78, as to commissioners in Chancery, and 5 & 6 Will. 4, c. 62, substituting a declaration in lieu of oaths in certain cases.

XXI. *Forms, —List of.*I. *As to Officers :*

GENERAL appointment of an officer (No. 57) (a).

BOND from surveyor (No. 58).

The like from treasurer (No. 59).

OATHS by trustees (No. 60).

FORMS of informations and convictions against toll collectors for misconduct (No. 61).

II. *As to Accounts :*

SUMMONS to attend justices (No. 62).

WARRANT to distrain for money found due (No. 63).

COMMITMENT for want of distress (No. 64).

GENERAL statement of income and expenditure, and state of roads (No. 65).

ESTIMATE of expense of maintaining turnpike trusts (No. 66).

III. *As to Purchases of Lands, &c. to improve, &c. Roads :*

NOTICE to owner and tenant of land to treat with trustees for purchase of land, &c. (No. 67).

PRECEPT to summon a jury to assess, &c. (No. 68).

NOTICE to owner of intended inquisition, requiring production of deeds, books, &c. (No. 69).

The like notice to the tenants (No. 70).

SUMMONS to witnesses to appear before jury (No. 71).

OATH to jury (No. 72).

OATH to witnesses (No. 73).

INQUISITION (No. 74).

ORDER of trustees for stopping up an old road and giving it in exchange to owner of land given up by him for the new road (No. 75).

CONVEYANCE (No. 76).

IV. *As to Repairs, &c. :*

AGREEMENT by subscription for advancing money to make and repair a road or highway (No. 77).

AGREEMENT between trustees and a party liable by tenure to repair some part of road (No. 78).

NOTICE by surveyor to get materials (No. 79).

MAGISTRATES' authority to get them (No. 80).

(a) To prevent the reader being misled, when referring to the forms relative to highways in general, which he might be, were the forms relative to turnpike roads numbered from No. 1,

it is thought fit to continue numbering the latter from the last form as to highways in general ; as to which forms see *ante*, p. 1125.

V. *As to Tolls:*

21. *Forms—list of.*

ORDER of trustees for reducing the tolls (No. 81).

NOTICE for letting tolls (No. 82).

NOTICE for letting tolls in lots (No. 83).

CONTRACT for letting tolls (No. 84).

LEASE of tolls (No. 85).

MORTGAGE of tolls (No. 86).

NOTICE of meeting of trustees for ordering side gate to be erected (No. 87).

ORDER of trustees for erecting a turnpike gate, &c. (No. 88).

WARRANT from justice to enter toll-gate house and eject persons therefrom (No. 89).

ORDER of trustees for erecting a weighing engine (No. 90).

TABLE of weights (No. 91).

AGREEMENT between trustees of different turnpike roads for erecting one weighing engine for the use of certain roads (No. 92).

INFORMATION and conviction against toll collector for extortion (No. 93).

The like against him for not putting his name on toll house (No. 94).

The like against a person for obstructing the weighing of a cart (No. 95).

The like for evading toll (No. 96).

VI. *As to Injuries and Annoyances to Roads:*

NOTICE from surveyor to cleanse ditches (No. 97).

The like to remove filth, &c. (No. 98).

The like to turn a drain, &c. (No. 99).

The like to make a tunnel (No. 100).

The like to prune, &c. a hedge, &c. (No. 101).

The like to remove a gate, &c. (No. 102).

ORDER to cut down trees, &c. (No. 103).

INFORMATION and conviction for encroaching on road by a hedge (No. 104).

The like for not cleansing ditches, &c. (No. 105).

The like for not trimming a hedge, &c. (No. 106).

The like for laying rubbish, &c. (No. 107).

The like for damaging milestones, &c. (No. 108).

The like for taking away scrapings, &c. (No. 109).

The like for riding on footpath (No. 110).

The like for riding on waggons without a guide (No. 111).

The like for not using skidpans (No. 112).

The like for not having name painted on waggon (No. 113).

SEE forms for destroying turnpike gates, &c. *post*, "*Malicious Injuries to Property*," Vol. III.

VII. *General Forms of Convictions, &c.:*

SUMMONS to attend justices (No. 114).

INFORMATION (No. 115).

CONVICTION (No. 116).

WARRANT to distrain (No. 117).

RETURN of constable where no effects (No. 118).

COMMITMENT for want of distress (No. 119).

VIII. *Appeal:*

NOTICE of, to quarter sessions (No. 120).

21. Forms.

I. FORMS AS TO OFFICERS.

(58.) Appointment of an officer (a).

At a meeting of the trustees [or, "commissioners"] of the turnpike roads under an act passed in the year of the reign of his Majesty King the , "For [state the title of the act]," held at the day of .

In pursuance and exercise of the power and authority given to or vested in us, in and by the above-mentioned act, and also in and by an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, and another act passed in the year of the reign of his [said late] Majesty's reign, "For [state the title of this act]," and of all other power and powers, authority and authorities, in anywise enabling us in this behalf: we whose names are hereunto subscribed, being the trustees [or, "commissioners"] of the said turnpike road, have nominated and appointed, and do hereby nominate and appoint, A. B., of [&c.], to be collector of the tolls arising on [or, "clerk to the trustees," or, "commissioners," or, "surveyor, &c. of"] the said turnpike road for year, or during the pleasure of the trustees [or, "commissioners"] of the said turnpike road for the time being, at the yearly salary of , for his care, attendance, labour, and services therein, the same to be allowed and paid quarterly [or, as the case may be], out of the monies arising on the said turnpike road, with full power and authority for him the said A. B. to collect, seize, and distrain for, recover and receive the tolls arising and payable at bar on the said turnpike road, and at the weighing engine and side bar at aforesaid [or, as the case may be], to do, execute, and perform all and every act, matter, and thing, acts, matters, and things whatsoever appertaining or incident to the said office of collector [or, "clerk, surveyor," &c.] under and according to the provisions, limitations and directions of the said respective acts, or either of them, or any other act or acts already passed, or hereafter to be passed, relating to the said turnpike road, and also subject and according to such orders, rules, and directions as he the said A. B. hath received, or shall from time to time receive, from the trustees [or, "commissioners"] of the said turnpike road, for the time being.

Given under our hands the day and year, and at the place first above written.

C. D. &c. &c.

If a temporary collector or receiver only is to be appointed in case of death, &c. "until the next meeting of the trustees [or, "commissioners"] of the said road," such appointment may be made by any two or more trustees or commissioners, although not assembled at a meeting. See ante, p. 1187.

(58.) Bond from the surveyor (b).

We, A. B., surveyor of the turnpike roads under an act passed in the year of the reign of King the , for [state the principal part of the title of the act], and C. D. of , are bound to E. F. of , in the sum of pounds, to be paid to the said E. F., his executors, administrators, and assigns, for which payment we hereby bind ourselves severally, and each of our heirs, executors, and administrators. Dated the day of .

The condition of this bond is such, that, if the said A. B., his executors, or administrators, shall duly and faithfully account for, apply, and pay all and every the sum and sums of money which hath or have come or shall come to his hands as surveyor of the turnpike road aforesaid, according to the direction and true intent and meaning of the said act, and of the statute made in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, then this bond to be void, or else to remain in full force.

(59.) Bond from treasurer.

The bond from the treasurer will be in the same form as (No. 58).

(60.) Oaths by trustees.

See the forms of the oaths to be taken by the trustees, as prescribed by the act, ante, p. 1158. [In lieu of these oaths, declarations to the same effect are now to be made. See ante, p. 1159.]

(61.) Forms against toll collectors for misconduct.

See forms of informations and convictions against toll collectors for misconduct, post, (Nos. 93, 94, 115, 116).

(a) See ante, p. 1182.

(b) The 3 Geo. 4, c. 126, gives this form. (See ante, p. 1186.)

2. FORMS AS TO ACCOUNTS.

21. Forms.

County of
to wit.

} To A. B. of

Whereas complaint hath been made to and before me, C. D., one of her Majesty's justices of the peace for the said [county, &c.] by E. F. [surveyor, &c.] on behalf of the trustees [or, "commissioners"] of the turnpike road [describing it] appointed by, or acting under, an act passed in the third year of the reign of his late Majesty King George the Fourth, intituled An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England; and also an act passed in the fourth year of the reign of his said late Majesty, intituled An Act [set forth the title of this act]; and also an act passed in the _____ year of the reign of his [late] Majesty King _____ the _____, intituled An Act, &c. [set forth the title of the local act]: That you,

A. B., being one of the officers appointed by the trustees [or, "commissioners"] of the said turnpike road, although thereunto required by the said trustees [or, "commissioners"] have refused and neglected to produce and deliver to such trustees [or, "commissioners"], or to such person, and within such time as they the said trustees [or, "commissioners"], appointed and limited for that purpose, and that you still refuse and neglect to produce and deliver to them or him, true, exact, and perfect accounts in writing, under your hand, of all monies which you have received to the time when such accounts were required to be delivered as aforesaid, by virtue of the said acts, or any or either of them, and how much thereof has been paid or disbursed, and for what purposes, together with the proper vouchers for such payments. [Or, "have refused and neglected to pay the money due on a certain account [or, "accounts"] produced and delivered by you to such trustees [or, "commissioners"] of all monies, &c., as above.] [Or, "that you, A. B., being, &c. (as above), did refuse or neglect to deliver up to the said trustees [or, "commissioners"], or to such person as they did appoint for that purpose, within ten days after being thereunto required by the said trustees [or, "commissioners"], all the books, papers, and writings in your custody or power relating to the execution of the said acts, or any or either of them. These are therefore to require you personally to appear before me, at _____, in the said [county], on the _____ day of _____ next, at the hour of _____ in the _____ noon, to answer to the said complaint made by the said E. F. on behalf of the said trustees [or, "commissioners"], the said E. F. being likewise directed to be then and there present, to make good the same. Herein fail not.

Given under my hand and seal this _____ day of _____

C. D. (L. S.)

To G. H. the [constable, headborough, or tithingman] of _____, in the said county. (63.) Warrant to
County of _____ } Whereas complaint having been made to and before me, C. D., to distrain for the
to wit. } one, &c., by E. F., &c., that A. B. of, &c., [set forth the com- money found
plaint as in the summons, ante, (No. 62)], I the said justice did thereupon, by due (b),
warrant under my hand, duly summon the said A. B. to appear before me at _____, this day; and the said A. B. appeared before me at such time and place, pursuant to the said summons, [or, "but it is duly proved and shown to me that the said A. B. was and is not to be found"]; whereupon I, the said justice, did proceed to hear the matter of such complaint in a summary way [and the said A. B. having produced a certain account [or, "accounts"] of or concerning the matters aforesaid, I did proceed, according to the directions of the statute in that case provided, to settle the said account [or, "accounts"]; and the said C. D., having heard the said complaint, acknowledged and voluntarily confessed the same to be true.] And it manifestly appearing to me upon such confession of the said A. B. against whom such complaint was so made as aforesaid [or, "by the oath," or, "oaths," of one witness, or, "witnesses,"], [or, "upon the inspection of the said account," or, "accounts," so produced as aforesaid], that the sum of _____, being the whole [or, "part"] of the money which has been collected and received by the said A. B., in the behalf and on the account aforesaid, is in the hands of the said A. B., and hath been by him refused and neglected to be paid as aforesaid, contrary to the said last-mentioned statute: These are therefore in her Majesty's name to command you to levy the said sum

(a) See form, *Bateman's General Turnpike Acts*; and ante, p. 1169.

(b) Ibid., ante, p. 1169.

21. Forms.

of by distress of the goods and chattels of him the said A. B. : and if within four days next after such distress by you taken, the said sum, and the charges of distraining and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the said sum of to the said trustees [or, "commissioners"], or such person or persons as they shall for that purpose appoint, according to the directions of the said last-mentioned statute, returning the overplus on demand to him the said A. B. (the reasonable charges of distraining and selling the said distress being first deducted); and if no goods and chattels of the said A. B. can be found sufficient to answer and satisfy the said money, and the charges of distraining and selling the same, that then you certify the same to me, together with this warrant.

Given under my hand and seal, the day of . C. D. (L. S.)

For the form of the constable's return, if no distress can be found, see post, (No. 118).

(64.) Commitment
for want of dis-
tress (a).

County of } To the [constable of] , in the said county, and to the
to wit. } keeper of the common gaol [or, "the house of correction"], at
, in the said county.

Whereas complaint, &c. [state the complaint and conviction, as in the summons and warrant of distress, ante, (No. 63)]; and whereas, on the day of , in the year aforesaid, I did issue my warrant to the [constable] of , to levy the sum of , by distress and sale of the goods and chattels of him the said A. B., according to the directions of the said last-mentioned statute. And whereas it duly appears to me, upon the oath of the said [constable], that the said [constable] hath used his best endeavours to levy the said sum of , on the goods and chattels of the said A. B. as aforesaid, but that no goods and chattels of the said A. B. can be found sufficient to answer and satisfy the said money, and the charges of distraining and selling the same; [or, "And whereas the said A. B. hath not appeared before me, the said justice, at the time and place by me appointed for that purpose, pursuant to the said summons, and there is no sufficient reason assigned for such non-appearance"]; [or, "And whereas the said A. B. hath appeared before me, the said justice, at the time and place by me appointed for that purpose, but hath then and there refused and neglected, and doth refuse and neglect, to give and deliver to me, the said justice, an account or accounts of all receipts and payments as aforesaid [or, "to produce and deliver to me, the said justice, the several vouchers and receipts relating to such accounts respectively"], [or, "the books, accounts, papers, and writings in his custody or power, relating to the execution of the said act of the year aforesaid, for making or repairing the said turnpike road, or the said act of the third, or the said act of the fourth years of the reign of his said late Majesty"], contrary to the statute in that case made and provided: These are therefore to command you, the said [constable] of aforesaid, to apprehend the said A. B. and him safely to convey to the common gaol [or, "house of correction"], at , in the said county, and there deliver him to the keeper thereof, together with this precept: And I do also command you the said keeper, to receive and keep in your custody the said A. B., without bail or mainprize, until he shall have accounted for and paid the full amount of the said money received by him [or, "in his hands"], as aforesaid, or compounded with the said trustees" [or, "commissioners"], and paid such composition in such manner as the said trustees or commissioners shall appoint [or, "until he shall have delivered up such books, papers, and writings as aforesaid, or made satisfaction thereof to the said trustees (or, "commissioners")]; and for so doing this shall be your sufficient warrant: provided that the said A. B. shall not, for the offence, or on the account aforesaid, be detained in prison for a longer space of time than [six] calendar months.

Given under my hand and seal the day of , in the year of our Lord, one thousand eight hundred and .

C. D. (L. S.)

(a) See form, *Bateman's General Turnpike Acts*; and see ante, pp. 1169 and 1278.

General Statement of the Income and Expenditure of the Turnpike Trust, in the County of , between the 1st day of January, , and the 31st day of December, (a).

(65.) General statement of income and expenditure of turnpike trust.

INCOME.		£ s. d.	EXPENDITURE.		£ s. d.
Balance in treasurer's hands, brought forward .			Balance due to the treasurer, brought forward .		
Revenue received from tolls .			Manual labour		
Parish composition in lieu of statute duty (b)			Team labour and carriage materials		
Estimated value of statute duty performed (b)			Materials for surface repairs .		
Revenue from fines			Land purchased		
— from incidental receipt			Damage done in obtaining materials		
Amount of money borrowed on the security of the tolls			Tradesmen's bills		
			Salaries :—Treasurer		
			Clerk		
			Surveyor. . . .		
			Law charges		
			Interest of debt		
			Improvements		
			Debts paid off		
			Incidental expenses		
			Statute duty performed, estimated value (b)		
Balance due to the trust .			Balance due to treasurer .		
DEBTS.		Rate of interest per cent.	ARREARS OF INCOME.		Insert the name and place of abode of the treasurer, clerk, general and superintending surveyor below.
Bonded or mortgage debt	£ s. d.	£ s. d.	Arrears of tolls for current year .		
Floating ditto			Arrears of parish composition, ditto .		
Unpaid interest			Arrears of any other receipt, ditto .		
Balance due to the treasurer			Arrears of former years		
Total debts			Total arrears		

(a) This form is given by the 3 & 4 Will. 4, c. 80. See ante, p. 1171.

(b) Now abolished.

21. Forms.

(66.) An estimate of the expense of maintaining the turnpike trust (a).

An Estimate of the Expense of maintaining the County of _____, between the 1st day of January, _____, and the 31st day of December, _____, (a).

Turnpike Trust in the _____, and the 31st day of _____

	£	s.	d.
Manual labour			
Team labour and carriage			
Materials delivered on the road, exclusive of carriage			
Land purchased			
Damage done in obtaining materials			
Tradesmen's bills			
Salaries			
Law charges			
Interest of debt			
Watering the roads			
Lighting ditto			
Incidental expenses			

Date of the existing act of Parliament.

The length of the trust, _____ miles. Distinguishing main from branch roads.

State the description and quantity of materials used on the trust, with the price per yard or ton; and if the damages in obtaining materials are paid for at per yard or ton, state the price.

III. FORMS OF PROCEEDINGS AS TO PURCHASING LAND TO IMPROVE, ETC., ROADS (b).

(67.) Notice to owner and tenant of land to treat with trustees for the purchase of land over which they have diverted a turnpike road, and for recompense, &c. (b).

To G. P., Esq., and to _____, or whom else it may concern.

Whereas you the said G. P., at the time of diverting and altering of the course of the turnpike road leading from _____ to _____ hereinafter mentioned, claim to be and now claim to be absolutely entitled, subject to a lease thereof, bearing date the _____ day of _____, granted to the said W. E. for a period of _____ years, subject to a certain rent and covenants, and which lease will expire on the _____ day of _____ next: and you, the said W. E., at the time of the diverting of the said road as aforesaid, claimed and now do claim to be entitled under the said lease to the slip or parcel of land hereunder mentioned and described.* And whereas the said slip or parcel of land was, at the time of the diverting and altering of the said road as aforesaid, and now is, situate, lying, and being within the distance of one hundred yards from the line or course of the said turnpike road, under the care and management of the trustees hereinafter mentioned, and no dwelling-house or any other building was, at the time of the diverting and altering of the said road as aforesaid, or now is erected on any part of the said slip or parcel of land; and no part thereof was, at the times aforesaid, or is a garden, yard, or paddock, or a park, planted walk, or avenue to a house, or enclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees. And whereas, at a meeting duly convened of the trustees appointed and acting under and by virtue of and in execution of an act of Parliament passed in the _____ year of the reign of his late Majesty King _____, and intituled [here describe the title of the local act under which trustees are acting], holden at _____, in the said county, on the _____ day of _____ last, it was determined by the said trustees to divert and alter the course of the said road, by making a road from the corner of a certain close called _____, and in the tenure or occupation of one _____, to a point called _____

(a) This form is given by 3 & 4 Will. 4, c. 80.

(b) See the act, &c., p. 1194.

[describing the points from and to which the new road has been made], over certain closes, and amongst others over the said slip or parcel of ground, and the said trustees then ordered that the said road leading from _____ to _____ should be so diverted and altered as aforesaid; and at the said meeting it was also deemed necessary by the said trustees to purchase the said last-mentioned slip or parcel of ground for the purpose of diverting and altering as aforesaid the course of the said last-mentioned road, and the said trustees then ordered that the said slip or parcel of ground should be purchased for the purpose aforesaid. And whereas, since the said meeting, in pursuance of the said order and determination of the said trustees, and by virtue of the said act of Parliament, and of other acts of Parliament hereinafter mentioned or referred to, the course of the said last-mentioned road has been diverted and altered as aforesaid. And whereas, by reason of the said new road having been made over the said slip or parcel of ground, you, and each of you, the said G. P. and W. E., have sustained damage.* We, therefore, the undersigned trustees, being the said trustees assembled at the said meeting, acting in the execution of the said first-mentioned act of Parliament, and by virtue of the same, and of the act of Parliament passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled, An Act to amend the acts for regulating turnpike roads, and of all other acts of Parliament enabling us in this behalf, do hereby give you notice, and require you respectively to treat with the trustees of the said turnpike road leading from _____ to _____, for the purchase by them of the said slip or parcel of land, and for the recompense you may be respectively entitled to in that behalf, and for the satisfaction which you are respectively entitled to receive from them for any loss or damage you may have respectively sustained by reason of the said new road having been made over the said slip or parcel of land, or otherwise by reason of the making of the said new road: and we further give you and each of you notice, that in case you do, for the space of thirty days next after the receipt of this notice, neglect or refuse to treat, or, by reason of absence, shall be prevented from treating, or do not agree in the premises with the said trustees, then that the said trustees will cease such recompense, loss and damage, to be inquired into and ascertained by a jury of twelve indifferent men of the county ["riding," or "place,"] wherein such slip or parcel of land lies, and will proceed thereupon according to the provisions of the said several acts of Parliament before mentioned or referred to, and the laws now in force in that behalf. Dated this _____ day of _____, 18 .

A. B., C. D., E. F., G. H., &c.

Trustees of the above-mentioned turnpike roads.

Particulars of the slip or parcel of ground above mentioned or referred to:—

A piece of land out of a close of pasture land called _____, situate, lying, and being in the parish of _____, in the county of _____, now in the occupation of you, the said W. E., as tenant thereof to you, the said G. P., or otherwise, extending in a northwardly direction from a piece of land or garden ground, lately the property of J. M. W., to the foot of the bridge adjoining a plantation belonging to you, the said G. P., and being of the length of seven hundred feet or thereabouts, and, throughout, of the breadth of forty-five feet, and containing about three thousand and five hundred square yards (a).

Whereas G. P., Esq., at the time of the diverting and the altering of the course of the turnpike road leading from _____ to _____ hereinafter mentioned, as hereinafter mentioned, claimed to be and now claims to be absolutely entitled, subject to a lease thereof, bearing date the _____ day of _____, and granted to one W. E., gentleman, for a period of _____ years, and which lease will expire on the _____ day of _____ next: and the said W. E., at the time of the diverting of the said road as aforesaid, claimed, and now does claim to be entitled under the said lease to a certain slip or parcel of land—viz., [describe land as in notice to treat, stating, "the said," instead of, "you the said"]. And whereas [here recite as in notice, from asterisk to asterisk, stating, "the said," instead of, "you the said _____"]. And whereas, after the making of the said new road over the said slip or parcel of land, to wit, on the _____ day

(68.) Precept to summon a jury under 3 Geo. 4, c. 126, s. 85, to ascertain the damages sustained by the owner, and tenant of land, by reason of it having been taken for the purpose of diverting, &c. a turnpike road (ante, p. 1195).

(a) Of course these particulars must be according to the case in question.

21. Forms.

of _____, J. G., &c., [here insert the names of the trustees who signed the notice], gentlemen, eight of the trustees acting in the execution of the said first-mentioned act of Parliament, and being the said trustees assembled at the said meeting, by virtue of the said first-mentioned act of Parliament, and of the act of Parliament passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled, An Act to amend the acts for regulating turnpike roads, and of all other acts of Parliament enabling them in that behalf, by a notice under the hands of the said trustees, bearing date the _____ day of _____, A.D. 18____, and directed to the said G. P. and W. E., and to whom else it might concern, did, after reciting as above is recited, give them, and each of them, the said G. P. and W. E., notice, and required them respectively, to treat with the said trustees of the said turnpike road leading from _____ to _____, for the purchase by them of the said slip or parcel of land, and for the recompense the said G. P. and W. E. might respectively be entitled to in that behalf, and for the satisfaction which they were respectively entitled to receive from the trustees of the said road, for any loss or damage they the said G. P. and W. E. might have respectively sustained by reason of the said new road having been made over the said slip or parcel of land, or otherwise by reason of the making of the said new road; and the said J. G., &c., [names of trustees who signed the notice], did, by the said notice in writing, further give notice to the said G. P. and W. E., and each of them, that in case they did, for the space of thirty days next after the receipt of the said notice in writing, neglect or refuse to treat, or by reason of absence should be prevented from treating, or did not agree in the premises with the said trustees of the said turnpike road, leading from _____ to _____, then that the said trustees would cause such recompense, loss, or damage to be inquired into and ascertained by a jury of twelve indifferent men of the county ["riding," or "place,"] wherein such slip or parcel of land lies, and would proceed thereupon according to the provisions of the said several acts of Parliament before mentioned or referred to, and the laws then and now in force in that behalf.

And whereas the said G. P. and W. E. did not, nor did either of them, within thirty days next after such notice in writing so given to them as aforesaid, or at any other time, treat or agree with the said trustees according to the said notice.* Now you the said _____, as sheriff of the said county, are hereby required and commanded forthwith to impanel, summon, and return an indifferent jury of twenty-four men of the county of _____, qualified to serve upon juries, to be and appear before the said trustees, at the inn or premises known by the sign of _____, and kept by Mr. _____, in _____, in the said county, between the hours of _____ and _____ of the clock in the morning of the _____ day of _____ next, in order that a jury of twelve men may be then and there chosen and sworn, to inquire into, and ascertain the value of the said respective interests of the said G. P. and W. E. in the said slip or parcel of land, and the damage and loss which the said G. P. and W. E. respectively have sustained beyond the value of their said respective interests in the said slip or parcel of land, by reason of the said new road having been made over the said slip or parcel of land, or otherwise by reason of the making of the said new road. Given under our hands and seals, this _____ day of _____, 18____.

To _____, Esquire, Sheriff of the	_____ (L. S.)	_____ (L. S.)	} Trustees.
County of _____	_____ (L. S.)	_____ (L. S.)	
	_____ (L. S.)	_____ (L. S.)	

(69.) Notice to owner of the intended inquisition, requiring him to produce deeds, &c.

To G. P., Esq.

You are hereby required to take notice, that, between the hours of _____ and _____ o'clock in the forenoon of the _____ day of _____, instant, at the inn or premises known by the sign of the _____, and kept by Mr. _____, in _____, in the said county, of _____, a jury will be duly chosen and sworn before the trustees (to be then and there assembled) appointed and acting under, and by virtue and in execution of, an act of Parliament passed in the _____ year of the reign of his late Majesty King _____, intituled, An Act, &c. [as ante, (No. 67)], to inquire into and ascertain the value of your and one W. E.'s respective interests in a certain slip or parcel of ground, viz., [here describe land], and the damage and loss which you and the said W. E. respectively have sustained beyond the value of your and the said W. E.'s respective interests in the said slip or parcel of land, by reason of a new road having been made over the said slip or parcel of land by the order of the trustees acting under the

said act of Parliament, for the purpose of diverting and altering the course of the said turnpike road leading from to , or otherwise by reason of the making of the said new road; and that the said jury will then and there inquire into and ascertain such value, damage, and loss, pursuant to such act of Parliament, and other the statutes in such case made and provided, according to the notice you have already received, bearing date the day of , A.D. 18 ; and you are hereby required to attend before the said trustees and jury at the time and place, and on the occasion above mentioned, and to produce and show before them the title-deeds of and relating to the said slip or piece of land; and also to produce the counterpart of any lease of, or any agreement by you for letting the said slip or piece of land, the notices you have received from the said trustees, their surveyor, or me as their clerk, bearing date respectively on or about the day of , the day of , the day of , the day of , and the day of last, relating to the said premises. Dated this day of , 18 . Yours, &c.

21. Forms.

To Mr. W. E.

You are hereby required to take notice, that, between the hours of and (70.) The like of the clock, in the forenoon of the day of instant, at the inn notice to the or premises known by the sign of the , and kept by Mr. , in tenant. in the said county of , a jury will be duly chosen and sworn before the trustees appointed and acting under, and by virtue, and in execution of an act of Parliament passed in the year of the reign of his late Majesty King , intituled, An Act, &c. [as ante, (No. 67)], to inquire into and ascertain the value of your and one G. P.'s respective interests in a certain slip or parcel of ground, viz., [here describe land], and the loss and damage which you and the said G. P. respectively have sustained, beyond the value of your and the said G. P.'s respective interests in the said slip or parcel of land, by reason of a new road having been made over the said slip or parcel of land by the order of the trustees, acting under the said act of Parliament, for the purpose of diverting and altering the course of the said turnpike road leading from to , or otherwise by reason of the making of the said new road; and that the said jury will then and there inquire into, and ascertain such value, loss, and damage, pursuant to such act of Parliament, and other the statutes in such case made and provided, according to the notice you have already received, bearing date the day of , A.D. 18 ; and you are hereby required to attend before the said trustees and jury, at the time and place, and upon the occasion aforesaid, and to produce before them the lease or agreements in writing, if any, under which you hold the said slip or piece of land, and all receipts for rent received by you respectively for the said slip or parcel of land.

Dated this day of 18 . Yours, &c. (a).

To

You, and each of you, are hereby summoned, required, and commanded to be and appear in your own proper persons before three or more of the trustees appointed and acting under, and by virtue, and in execution of an act of Parliament, passed in the year of the reign of his late Majesty King , intituled, An Act, &c. [as ante, (No. 67)], at the inn or premises known by the sign of the , and kept by Mr. , in the county of , between the hours of and of the clock in the morning of the day of , instant, to be examined and give evidence on oath before a jury, to be then and there chosen and sworn before the said trustees, pursuant to the statutes in that case made and provided, to inquire into and ascertain the value of the respective interests of one G. P. and one W. E. in a certain slip or parcel of land, viz., [here describe land], and the damage and loss which they may have respectively sustained beyond the value of their said respective interests in the said slip or parcel of land, by reason of a new road having been made over the said slip or parcel of land, by the order of the trustees acting under the said first-mentioned act of Parliament, for the purpose of diverting and altering the said turnpike road leading from to , or otherwise by reason of the making of the

(71.) Summons to witnesses to appear before jury (b).

(a) The notices may be signed by the clerk.

(b) See p. 1195.

21. Forms. *said new road. And herein you are not to fail upon any pretence whatsoever, or you will be fined according to the directions of the said act of Parliament.*
Dated this day of , 18 , (a).

(72.) Oath to jury (b).

I, , do swear that I will well and truly inquire into, ascertain, and assess, without any favour, partiality, or affection whatsoever, the value of the respective interests of one G. P. and one W. E. in a certain slip or parcel of land, viz., [here describe land], and the damage and loss sustained by them respectively, beyond the value of their said respective interests in the said slip or parcel of land, by reason of a new road having been made over the said slip or parcel of land, by the order of the trustees acting in the execution of an act of Parliament made and passed in the year of the reign of his late Majesty King , intituled, An Act, &c., [title of local act], and by virtue of the said act of Parliament and other acts of Parliament in that case made and provided for the purpose of diverting and altering the course of the said turnpike road, or otherwise by reason of the making of the said new road; and that I will a true verdict give according to the evidence.

So help me God.

(73.) Oath to witnesses (c).

The evidence you shall give before the jury sworn to inquire into, ascertain, and assess the value, [here set out the form of an oath to the jury, as pointed out in the preceding form between the brackets], shall be the truth, the whole truth, and nothing but the truth.

So help you God.

(74.) Inquisition after the above proceedings.

— } An inquisition taken at the house of Mr. , known by the to wit. } name or sign of the , in , this day of , in the year of our Lord, 18 , and in the year of the reign of our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, by virtue of the warrant or precept hereunto annexed, and hereafter recited, before and , seven of the trustees appointed and acting under and by virtue of an act of Parliament passed in the year of the reign of his late Majesty King , intituled, An Act, &c. [insert title of local act, as ante, (No. 67)], and by virtue of the same and other acts of Parliament in such case made and provided, upon the oaths of and , twelve indifferent men, of the said county qualified to serve upon juries.

Whereas [recite as in precept ante, (No. 68), down to asterisk.] And whereas, by a precept or warrant bearing date the day of , A.D. 18 , under the hands and seals of the said J. G., &c. of the trustees acting in the execution of the said first-mentioned act of Parliament, after reciting as above is recited, they, the said trustees, required and commanded the said , as sheriff of the said county of , forthwith to impanel, summon, and return an indifferent jury of twenty-four men of the said county of , qualified to serve upon juries, to be and appear before the said trustees of the said turnpike road leading from to , at the inn or premises known by the sign of , and kept by Mr. , in , in the said county, between the hours of and of the clock in the morning of the said day of , A.D. 18 , in order that a jury of twelve men might be then and there chosen and sworn to inquire into and ascertain the value of the said respective interests of the said G. P. and W. E. in the said slip or parcel of land, and the damage and loss which they had respectively sustained, beyond the value of their respective interests in the said slip or parcel of land, by reason of the said new road having been made over the said slip or parcel of land, or otherwise by reason of the making of the said new road. And whereas the said sheriff, in pursuance of the said precept or warrant, did impanel, summon, and return twenty-four persons qualified to serve upon juries, according to the said precept or warrant. And whereas out of such persons so impanelled, summoned, and returned, as appeared upon such summons, the said

(a) It would seem that the clerk might sign for the trustees.

(b) See p. 1197.

(c) See p. 1195.

caused to be sworn twelve men, being the said , that they would well and truly inquire into, ascertain, and assess, without favour, partiality, or affection the said value, loss, and damage, as aforesaid. And whereas not any of the said twelve men were challenged when they came to be sworn as aforesaid. And whereas, a reasonable time before the holding of this inquisition, that is to say, on the day of , A.D. 18 , a notice in writing was given by the said to the said G. P. and W. E. of the holding of this inquisition. And thereupon the said [jurors], being, in pursuance of the said precept, and of the said acts of Parliament, duly impannelled, summoned and returned, and being duly sworn as aforesaid, and the said G. P. and W. E. having respectively, by their counsel, at the time and place of the holding of this inquisition, appeared before the said jurors, and evidence having been adduced before them respecting the matters in question as aforesaid, the said jurors upon their oath say that the value of the said interest of the said G. P. in the said slip or parcel of land is the sum of £ , and that the loss and damage he has sustained beyond the value of his said interest in the said slip or parcel of land, by reason of the said new road having been made over the said slip or parcel of land, or otherwise by reason of the making of the said new road, in the sum of £ , and that the value of the said interest of the said W. E. in the said slip or parcel of land is the sum of £ , and that the loss or damage which he has sustained by the cause aforesaid is the sum of £ . In witness whereof, as well the said as the jurors aforesaid have hereunto respectively set their hands and seals the day and year first aforesaid.

21. Forms.

The undersigned trustees hereby order that so much of the old turnpike road leading from to , as lies between the points at which the said old turnpike road touches the new line of turnpike road lately formed at or near , commencing from and extending to , and containing in length by admeasurement rods, be the same more or less, and situate in the parish of aforesaid, shall be stopped up, and wholly discontinued to be used as a public highway, the same having, in the judgment of the said trustees, become useless and unnecessary, and that the said old turnpike road so ordered to be stopped up, shall be delivered up to and become the sole and absolute property of of aforesaid [widow], and of , Esq. [as devisees in trust under the will of the late of aforesaid], pursuant to the agreement in that behalf with the said [devisees], and in exchange for the land given up by them, and intended to be forthwith conveyed to the said trustees, and now formed into and constituting the new road as aforesaid, and to be henceforth used as and for a turnpike road, containing in length, by admeasurement, rods, or thereabouts, and also situate in the parish of aforesaid, together with the piece of land also given up by the said [devisees] to the said trustees, and added to the said turnpike road, containing in length rods, and in width (on an average) , or thereabouts, lying, &c., and in the said parish of .

(75.) Order of trustees for stopping up an old road, and giving it in exchange to owner of land given up by him for the new road (a).

(Signed) (b).

See form of conveyance as prescribed by the act, ante, p. 1202.

(76.) Conveyance.

IV. FORMS AS TO REPAIRS, &c.

We, whose names are subscribed, do agree to advance and pay the several sums written by us opposite to our names, unto , to be laid out and expended in the making and repairing a certain highway, leading from to , after an act of Parliament shall be obtained for making the same turnpike road, upon having the tolls to be collected upon such turnpike road assigned and made over to us as a security for the respective sums so to be advanced by us,

(77.) Agreement by subscription for advancing money to make and repair a turnpike road or highway (c).

(a) See p. 1203. This form was held good in *Allnutt v. Pott*, 1 B. & Adol. 302.

(b) To be signed by the major part of the trustees assembled at the meet-

ing at which the order is made, p. 1194.

(c) The 3 Geo. 4, c. 126, gives this form p. 1205.

21. *Forms.* *together with interest for the same, after the rate of* _____ *per centum per annum, which sums we do hereby severally agree to pay, by instalments in the following manner, viz. one-fourth part thereof on the* _____ *day of* _____ *next; one other fourth part [&c. &c. &c.]*
Dated this _____ *day of* _____ .

(78.) Agreement between trustees and a person liable by tenure to repair some part of road(a).

At a meeting of the trustees of the turnpike roads, under an act passed in the _____ *year of the reign of King* _____ *the* _____ *“For [state the principal part of the title of the act], held at* _____ *, the* _____ *day of* _____ *Whereas A. B., of* _____ *is liable by tenure, &c. [as the case shall be], to the repair of a certain highway leading between* _____ *and* _____ *, of the length of* _____ *yards or thereabouts; and the said highway being now made a turnpike road by virtue of the said act, will occasion a greater expense to make and keep the same in proper repair than would have been necessary if no such act had been obtained, and the said A. B. attending this meeting in person [or, by C. D. his attorney or agent authorised to treat in his behalf], the said trustees and the said A. B. &c., in pursuance of a power given by an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, have, in order to put and keep the said road into proper condition and repair, come to the following agreement; videlicet, that the said trustees shall, on or before the* _____ *day of* _____ *next, pay and allow the sum of* _____ *out of the tolls arising from the said turnpike roads, towards putting the said road into proper repair, to be laid out and expended by the surveyor of the said turnpike road; and that the said A. B. shall advance and pay into the hands of the treasurer of the said turnpike road, on or before the* _____ *day of* _____ *next, the sum of* _____ *, to be also laid out and expended by the said surveyor in the repair of the said road, and that, from and after the* _____ *next, the said turnpike road shall be kept in repair by the said trustees out of the said tolls as aforesaid, so long as the said turnpike act shall continue, upon the said A. B. paying into the hands of their treasurer the sum of* _____ *, upon the* _____ *, in every year, which the said A. B. doth hereby, for himself and his heirs, agree to pay accordingly, so long as the said road shall be so repaired by the said trustees as aforesaid.*

Or, if it shall be agreed that A. B. shall keep the road in repair upon having an annual allowance in money from the said trustees, let the agreements be varied and adapted to the case. See other Forms as to Nuisances, &c., *post*.

(79.) Notice by surveyor to show cause why materials should not be had (b).

I, A. B., surveyor of the turnpike road [describing it], do hereby give you notice, and require you forthwith “to appear before E. F. and G. H., esquires, two of her Majesty’s justices of the peace acting in and for the [county] of &c., at _____ *, on* _____ *the* _____ *day of* _____ *next, to show cause why materials for making [or, ‘repairing’] the said turnpike road shall not be had and taken from and out of certain inclosed land [or, ‘grounds and premises, situate at* _____ *, in the county of* _____ *, of which you are the owner or occupier,]” according to the directions of an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating the turnpike roads [or as the case may be]. Dated this* _____ *day of* _____ *, 18* _____ .

A. B.

Instead of the words within the inverted commas, the following may be used, according to circumstances.

“To appear before E. F. and G. H., esquires, two of her Majesty’s justices of the peace acting in and for the [county] of, &c., at _____ *, on* _____ *the* _____ *day of* _____ *next, when and where the said justice will hear, settle, and determine the matter in difference between you and me, concerning the materials taken (or intended to be taken) and carried away from and out of certain inclosed lands, situate at &c., and also concerning the payments and satisfaction for such materials, and the damages done, or to be done, to you, in respect thereof, and the costs attending the hearing and determining the same.”*

County of } Whereas it hath been made to appear unto us, J. P. and K. P.,
 _____ { esquires, two of her Majesty's justices of the peace for the said county
 acting within the [hundred] of _____, upon the oath of A. S., surveyor of the
 turnpike road [describing it], and other proof upon oath, that notice in writing,
 signed by the said surveyor, hath been duly given to [or, "left at the house (or
 last or usual) place of abode of"] A. B., of _____, the owner [or, "the known
 agent of the owner," or, "the occupier"] of certain lands and premises, situate
 at _____, being a parish ["hamlet," or "place"] within the county and [hun-
 dred] aforesaid, and in which a part of the said turnpike road lies or is situate
 [or, "being an adjoining parish ["hamlet," or "place"] to the said turnpike
 road"] (the said land and premises not being a garden, yard, park, paddock,
 planted walk or avenue to any house, or piece of ground planted and set apart
 as a nursery for trees), to appear before us to show cause why materials for
 making or repairing the said turnpike road should not be had and taken out of
 and from the said lands and premises, according to the directions of an act
 passed in the third year of the reign of his late Majesty King George the Fourth,
 for regulating turnpike roads. And whereas the said A. B. hath attended [by
 G. H. his agent], pursuant to such notice, but hath not shown sufficient cause to
 the contrary [or, "hath neglected and refused to appear by himself [or, 'her-
 self,'] or his [or, 'her,'] agent, pursuant to the said notice, the service of
 which upon the said A. B. hath been duly proved on oath"] : We do therefore,
 after hearing what has been alleged, and duly considering the premises, think it
 proper to order, and do hereby order and authorise the said A. S. as such sur-
 veyor as aforesaid, to dig, get, gather, take, and carry away such materials for
 the purposes as aforesaid, out of and from the said lands and premises of [or,
 "occupied by"] the said A. B., at any time or times between the _____ day of
 _____, and the _____ day of _____, according to the directions and subject to
 the restrictions of the said act.
 Given under our hands and seals, the _____ day of _____, in the year of our
 Lord one thousand eight hundred and _____.
 To A. S., and all others whom it may concern. J. P. (L. S.)
 J. P. (L. S.)

21. Forms.
 (80.) Magistrates' authority to get materials out of inclosed lands (a).

V. FORMS AS TO TOLLS.

At a meeting of the trustees of the turnpike roads, under an act passed in the _____ year of the reign of King _____ the _____, "For" &c. [state the prin-
 cipal part of the title of the act], held at _____, the _____ day of _____, (81.) Order of trustees for reduc-
 ing the tolls (b).

We, whose names are subscribed, being _____ or more of the trustees acting
 under the said act, being now assembled for reducing the tolls authorised to be
 taken by and under the said act, pursuant to public notice given for that pur-
 pose in the _____ newspapers circulated in this part of the county, and also affixed
 upon all the turnpike gates erected upon the said turnpike road, for upwards of
 one calendar month now last past, and having the consent of the several persons
 entitled to five-sixth parts of the money now remaining due upon the credit of the
 said tolls, this day signified and proved to us, do hereby order, that the tolls
 granted by the said act shall, from and after the said _____ day of _____, be
 lessened and reduced in the following manner [here state the several reductions
 proposed to be made].

Notice is hereby given that the tolls arising at the toll gate [or, "toll gates," if
 more than one], upon the turnpike road at _____, called or known by the name
 of the _____ gate, will be let by auction to the best bidder at the house of _____,
 at _____, on the _____ day of _____ next, between the hours of _____ and _____,
 in the manner directed by the act passed in the third year of the reign of his late
 Majesty King George the Fourth, for regulating turnpike roads, which tolls
 produced the last year the sum of _____ above the expenses of collecting them, and
 will be put up at that sum; whoever happens to be the best bidder, must, at the

(82.) Notice of letting tolls (c).

(a) See form, *Bateman's Turnpike Acts*; and see p. 1213.
 (b) The 3 Geo. 4, c. 126, gives this form. See p. 1248.
 (c) The 3 Geo. 4, c. 126, gives this form. See p. 1248.

Highways, Turnpike.

21. *Forms.* *same time, pay one month in advance (if required) of the rent at which such tolls may be let, and give security, with sufficient sureties, to the satisfaction of the trustees of the said turnpike road, for payment of the rest of the money monthly [or in such other proportions as shall be directed].*

A. B.

Clerk to the trustees of the said turnpike road.

(83.) Notice for letting tolls in lots (a).

Notice is hereby given, that the tolls arising at the several toll gates upon the turnpike road at , called or known by the name of A. gate, B. gate, &c., will be let by auction to the best bidders, at the house of , at , on the day of next, between the hours of and , in the manner directed by the acts passed in the third and fourth years of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, which tolls produced the last year the sum of above the expenses of collecting them.

N. B. These tolls will be let in parcels or lots, and each parcel or lot will be put up at such sum as the trustees shall think fit.

** * Whoever happen to be the best bidders must respectively give security, with sufficient sureties to the satisfaction of the trustees of the said turnpike road, for payment of the rent at which such tolls shall be let monthly [or in such other proportions as shall be directed].*

A. B.

Clerk to the trustees of the said turnpike road.

(84.) Contracts for letting tolls (a).

At a meeting of the trustees [or, "commissioners"] of the turnpike road, under an act passed in the year of the reign of his Majesty King , "For," [state the title of the act], held at , the day of , 18 , by public notice and advertisement duly given for the purpose of letting to farm the tolls of the several gates erected upon the said turnpike roads in the manner directed by an act passed in the third year of the reign of his late Majesty King George the Fourth, and another act passed in the fourth year of the reign of his said Majesty, for regulating turnpike roads.

CONDITIONS OF LETTING.

1. *That the said tolls shall be put up at the sum of [or, "shall be put up in parcels or lots, at the following sum [or, 'sums'], viz. Lot 1, A. bar, at , Lot 2, B. bar, at , &c., being the sum [or, 'sums'] which they produced the preceding year."]*

2. *That the last or the highest bidder [or, "bidders"], above the said sum [or, "respective sums"], to be declared and determined in the manner directed by the said act of the third year of his Majesty's reign, shall be the farmer or renter of the said tolls for the term of years, from the day of .*

3. *That the rent shall be paid to the trustees [or, "commissioners"] of the said turnpike road for the time being, or their treasurer, or such other person or persons as they shall appoint, by thirteen equal monthly payments, at the end of each successive period of four weeks [or as the case may be], without any deduction; the first payment to be made on the day of .*

4. *That the taker or renter shall perform, &c. [see the quotation within inverted commas in the next precedent, or insert any other condition which the commissioners may direct].*

5. *That the last or highest bidder shall enter into a proper agreement for the taking thereof, and paying the money at the times above specified, with one [or, "two"] sufficient sureties to the satisfaction of the trustees [or, "commissioners"], for payment of such money, and under the conditions, and in the manner herein directed and stipulated for that purpose.*

6. *That if the last bidder [or, "bidders"] shall not forthwith enter into such agreement, or shall refuse to perform these conditions, it shall and may be lawful to and for the trustees [or, "commissioners"] of the said turnpike road, to put up the said tolls again immediately, or at any time afterwards, and to re-let the same, as if no such bidding had been made. In which case the deposit money*

(if any) shall be forfeited, and any deficiency on such subsequent letting shall be made good by the defaulter at the present letting, and be recoverable as and for liquidated damages.

21. Forms.

MEMORANDUM.

E. F., of _____, having become the highest or last bidder for the above-mentioned tolls [or, the first lot, &c.], and duly declared the farmer or renter of the same, at the sum of _____, for [one] year from the _____ day of _____, and having produced *G. H.*, of _____, and *I. K.*, of _____, as his sureties for the purpose above mentioned, the trustees [or, "commissioners"] of the said turnpike road (in pursuance of the power and authority given to, or vested in them in and by the above-mentioned acts, or some or one of them, and of all other powers and authorities enabling them in this behalf), have contracted and agreed, and do hereby contract and agree with the said *E. F.* to let, and the said *E. F.* doth hereby agree to take, the said tolls, and all and every the said gates [comprised in Lot 1, &c.], for the term of [one] year from the _____ day of _____, at the yearly rent of _____, payable as aforesaid, and under and subject to the conditions, stipulations, and agreements hereinbefore contained. And the said *E. F.*, as farmer or renter of the said tolls, and the said *G. H.* and *I. K.* as his sureties, do hereby severally promise, undertake, and agree to and with the trustees [or "commissioners"] of the said turnpike road, that he the said *E. F.*, his executors or administrators, shall and will well and truly pay or cause to be paid the said yearly rent or sum of _____, at the times and in the proportions and manner hereinbefore limited and appointed for that purpose, and perform, fulfil, and keep all and singular the conditions, restrictions, and agreements hereinbefore contained, and which, on the part of the highest or last bidder, farmer, or renter of the said tolls, are or ought to be performed.

Witness the hands of *A. B.* and *C. D.* of the trustees [or "commissioners"] of the said turnpike road; and of the said *E. F.*, *G. H.*, and *I. K.*, the day and year, and at the place first above written.

A. B., *C. D.*, *E. F.*, *G. H.*, *I. K.*

N.B.—This agreement, if signed by two trustees, or by the clerk (a) or treasurer, and the lessee or farmer, and his sureties, is declared to be valid, although not by deed under seal. (See ante.

This indenture, made the _____ day of _____, in the _____ year of the reign of our sovereign lady Victoria, and in the year of our Lord one thousand eight hundred and _____, between *A. B.*, *C. D.*, &c., being _____ of the trustees [or "commissioners"], appointed by or under a certain act of Parliament, made and passed in the _____ year of the reign of his Majesty _____, intituled An Act, &c., [set forth the title of the local act] of the one part; and *E. F.*, of _____, *G. H.*, of _____, and *I. K.*, of _____, of the other part. Whereas, at a meeting of the trustees of the said turnpike road, held at the house of _____, in _____, in the said [county, &c.], on the _____ day of _____, by public notice and advertisement duly given, for the purpose of letting to farm the tolls of the several gates erected upon the said turnpike road, [or, "the tolls hereinafter mentioned"], in the manner directed by an act passed in the third year of the reign of his late Majesty King George the Fourth, intituled, An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England, and also by an act passed in the fourth year of the reign of his said Majesty, intituled, An Act, [set forth the title of this act], the said *E. F.* became the highest or last bidder for the same, at the yearly rent of _____, and was accordingly declared the farmer or renter thereof for the term of _____ year, from the _____ day of _____. [And whereas the said *G. H.* and *I. K.* have, at the request of the said *E. F.*, and in order to satisfy the conditions of letting the said tolls, agreed to become parties to these presents, and to enter as sureties along with him the said *E. F.* for payment of the yearly rent, and for the performance of the covenants and agreements hereinafter reserved and contained.] Now this indenture witnesseth, that, for and in consideration of the rent herein-

(a) See ante, p. 1251.

(b) See this form, *Bateman's Turnpike Acts*; and ante, p. 1250.

21. *Forms.*

after reserved, and of the covenants and agreements hereinafter contained on the part and behalf of the said E. F., G. H., and I. K., their respective executors and administrators, to be paid, done, and performed, they the said A. B., C. D., &c., in pursuance and exercise of the power and authority given to or vested in them, in and by the said several recited acts, or any or either of them, and of all other power or powers, authority and authorities, in anywise enabling them in this behalf, have demised, leased, and to farm let, and by these presents do demise, lease, and to farm let unto the said E. F., his executors and administrators, all and singular the tolls of the several gates erected upon the said turnpike road, and also the said several gates [or "of the gate"] situate at _____, [and at the side gate or side bar at _____], [and also at the weighing engine erected upon or near the said turnpike road at _____, (or as the case may be)], with full power and authority for him the said E. F., his executors and administrators, and such person or persons as he or they shall authorise or appoint to collect and receive the said tolls, according and subject to the provisions and restrictions of the said several acts, or any or either of them, and under and subject to such rules, orders, reductions, variations, and regulations as have been, or shall at any time or times hereafter be made, ordered, or agreed upon by the said trustees or commissioners for the time being of the said turnpike road, pursuant to the powers vested in them in and by the said acts, or any or either of them; and for that purpose to occupy and enjoy the toll house [or, "toll houses"] at which the said tolls are to be collected and to arise, with all the appurtenances and conveniences to the same toll house [or, "toll houses"] belonging, during so long time only of the term hereby granted as the said E. F., his executors or administrators, shall duly and regularly pay the rent, and perform the covenants and agreements herein reserved and contained; to have and to hold the said tolls and gates, and all and singular other the premises hereinbefore mentioned, and intended to be hereby demised, unto the said E. F., his executors or administrators, from the _____ day of _____, for and during, and unto the full end and term of [one] year from thence next ensuing, and fully to be complete and ended; yielding and paying therefore, during the said term, unto the trustees [or "commissioners"] of the said turnpike road for the time being or their treasurer (a) for the time being, or such other person or persons as they shall appoint, the yearly rent or sum of _____, of lawful money of Great Britain [by thirteen equal monthly payments in the year, at the end of each successive period of four weeks, (or as the case may be)], without making any deduction or abatement thereout on any account or pretence whatsoever; the first [monthly] payment thereof to begin and be made on the _____ day of _____ now next ensuing. Provided always, and it is hereby declared and agreed by and between the said parties hereto, that if the said rent hereinbefore reserved shall be in arrear by the space of seven days next after any of the days on which the same ought to be paid, as aforesaid, and pursuant to the covenant or agreement hereinafter contained; or if the said E. F., his executors or administrators, shall neglect or refuse to perform the covenants and agreements herein contained, and which, on his or their part and behalf, are or ought to be done and performed, then, and in any or either of the said cases, it shall and may be lawful to and for the trustees [or, "commissioners"] of the said turnpike road for the time being, or such person or persons as they shall authorise or appoint for that purpose, into and upon the said tolls, gates, toll houses, conveniences, and premises, with the appurtenances, or into or upon any part thereof in the name of the whole, wholly to re-enter, and the same to have again, collect, receive, retain, re-possess, and enjoy, as in their former estate; and the said E. F., his executors and administrators, and all other collectors, receivers and occupiers of the said premises, thereout and from thenceforth utterly to expel, put out, and remove, and thereupon and from thenceforth to vacate and determine these presents, or otherwise to act in the premises as to them the said trustees or commissioners shall seem meet, according to the directions and provisions in that behalf contained in and by the said several acts of Parliament, or any or either of them, (anything to the contrary thereof hereinbefore contained in anywise notwithstanding). And the said E. F., G. H., and I. K., do hereby for themselves jointly and severally (b), and for their several

(a) See *ante*, p. 1249, n. (c), and p. 1250, n. (c).

(b) See *Lee v. Nixon*, 1 A. & E. 201.

and respective heirs, executors, and administrators, covenant, promise, and agree to and with the said A. B., C. D., &c., and the trustees [or, "commissioners"] of the said turnpike road for the time being, that he the said E. F., his executors, administrators, or assigns, shall and will well and truly pay, or cause to be paid, unto the trustees [or, "commissioners"] of the said turnpike road for the time being, or their treasurer for the time being, or such other person or persons as they shall appoint, the said yearly rent or sum of _____, by thirteen equal monthly payments at the end of each successive period of four weeks, without any deduction or abatement whatever, as aforesaid, according to the true intent and meaning of these presents; and [to repair the toll house, or any other condition as agreed upon]; "and also that the said E. F., his executors or administrators, shall and will well and truly observe, fulfil, abide by, pay, and keep all the conditions, restrictions, provisoes, clauses, and limitations, respectively limited, inflicted, and declared in and by the said several hereinbefore recited acts, or either of them, concerning or appertaining to collectors or gatekeepers, or to the managing, recovering or receiving the tolls, or on any other account relating to or concerning the office of collector or gatekeeper; and also shall and will, from time to time, and at all times during the said term of [one] year, pay obedience to and perform all and every such orders and directions as shall be legal, and as the trustees [or, "commissioners"] of the said turnpike road at any of their meetings during the time aforesaid shall think expedient and proper to be done by them respectively to the said turnpike road, and the tolls to arise therefrom." And moreover, that, at the expiration or other sooner determination of the said term of [one] year, whichever shall first happen, he, the said E. F., his executors and administrators, shall and will quietly quit, yield, and deliver up the possession of the said toll house [or, "houses"] and toll bar [or, "bars"], and the receipt and collection of the said tolls to the trustees [or "commissioners"] for the time being of the said turnpike road, or to such person or persons as they shall appoint for that purpose.

In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

A. B. (L. S.)
C. D. (L. S.)
E. F. (L. S.)

Signed, sealed, &c.

21. Forms.

See the forms as to mortgages of tolls prescribed by the act, *ante*, p. 1253.

(86.) Mortgage of tolls.

Notice is hereby given, that the trustees of the turnpike roads, under an act passed in the _____ year of the reign of King _____ the _____, for [state the material parts of the title of the act], will meet at the house of _____, at _____ on the _____ day of _____ next, at the hour of _____, in the forenoon, in order to consult about erecting a toll gate on the side of the said turnpike road, at or near a place called _____, across a certain highway there, leading to _____ the _____ day of _____.

(87.) Notice of meeting of trustees for ordering a side gate to be erected (a).

A. B.
Clerk to the said trustees.

We, A. B., &c. being the trustees of a turnpike road, leading from _____ to _____, under an act passed in the _____ year of the reign of his late Majesty King _____, intituled An Act [title of local act], assembled at a special meeting, held at, &c., on &c., for the purpose of making this order and ordering and directing as hereinafter mentioned, of which meeting public notice, specifying the time and place, and the purposes thereof, has been given in a certain newspaper, to wit, a newspaper called the _____, published and circulated in the county [or, "counties"] through which the said turnpike road passes, and also by affixing a copy of such notice on all the turnpikes, toll-gates, and side-bars which are now standing on the said road, fourteen days previously to such meeting, do, at the said meeting, judge it necessary, and there being nothing in any local act provided to the contrary, at the said meeting, order and direct, by this order, in writing, signed by three of the said trustees present at the said meeting, that

(88.) Order of trustees for erecting turnpike gates, &c. (b).

(a) See *ante*, p. 1244, and 3 Geo. 4, c. 126, sch. No. 4.

(b) See *ante*, p. 1244; and 3 Geo. 4, c. 126, sch. No. 5.

Highways, Turnpike.

21. Forms.

there be forthwith erected and built in, upon, and across the said turnpike road, and upon the sides thereof, the toll gates, turnpikes, side-bars, and chains hereafter mentioned, with toll houses, outhouses, and other conveniences thereto, in the places and manner hereinafter mentioned, that is to say,—one toll gate or turnpike upon and across the said turnpike road, at a place called _____, with one toll-house, suitable outhouses, and other conveniences thereto, upon the side of the said turnpike road and toll-gate adjoining to land now in the tenure or occupation of one _____, the said toll-house, outhouses, and other conveniences not to be built upon or to cover more than _____ square feet of ground. One side-bar upon the side of the said turnpike road, near a place called _____, across a certain highway there, leading from _____ to _____, with one toll-house, suitable outhouses, and other conveniences thereto, adjoining the said side-bar upon the side of the said turnpike road, abutting upon land in the occupation of _____, the said toll-house, last-mentioned outhouses and other conveniences, not to be built upon or to cover more than _____ square feet of ground. [Let the above description of the place and manner in which the turnpikes, &c., are to be placed, agree with the facts]. And the said trustees, at the said meeting, do also, by this order in writing, order, direct, and appoint, that there shall be taken in and enclosed, on the sides of the said turnpike road, suitable garden spots for each of such toll-houses, that is to say, for the said first-mentioned toll-house, there shall be taken in and enclosed a piece of ground containing _____ square yards, to be bounded &c. [giving a description of the land to be taken in], and for the toll-house secondly above-mentioned, a piece of land containing _____ square yards, bounded &c. Dated the _____ day of _____, A.D. 18 ____.

(Signed) _____ (a).

89.) Warrant from a justice to enter the toll-gate house, and remove the persons therein (b).

County of _____ } To the [constable, headborough, or "tithingman"] of _____
to wit. } in the said county.

Whereas complaint hath been made unto me, A. B., esquire, one of her Majesty's justices of the peace for the said county, upon the oath of _____, and other evidence now produced to me, that C. D., who now inhabits the turnpike or toll-gate house at _____, upon the turnpike road leading from _____ to _____, and was appointed to collect the tolls there, hath been duly discharged by the trustees of the said turnpike road from any further collecting or receiving the tolls arising at the said gate, and hath refused and still doth refuse to quit the possession of the said house; and the said C. D. having been summoned to appear before me this day, to show cause why he should not be removed from the said house, and having shown no sufficient cause for that purpose [or, "not having appeared"], I do hereby authorise and require you, with such assistance as shall be necessary, to enter into the said toll-house or turnpike house, and the buildings belonging thereto, in the day time, and to remove the said C. D., and all such persons as shall be found therein, together with his and their goods, out of such house and buildings, and to put E. F., the person lately appointed by the trustees to collect such tolls, into the possession thereof; for which this shall be your sufficient warrant.

Given under my hand and seal, this _____ day of _____.

This form may be varied to suit the case of the widow or family of a deceased collector.

90.) Order of trustees for erecting a weighing engine (c).

At a meeting of the trustees of the turnpike roads, under an act passed in the _____ year of the reign of his _____ Majesty King _____ the _____, for [state the title of the act], held at _____, the _____ day of _____, 18 ____.

In pursuance of the powers given to us by an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, we do hereby order that an engine, proper for the weighing of carriages, of the constructions and weights specified in the said act, be forthwith erected at or as near as conveniently may be to the toll-gate or bar now erected upon the said turnpike road, at _____; and that A. B., the [treasurer, clerk, or] surveyor of the said turnpike road, do contract with some proper person [or, with

(a) To be signed by three of the trustees who were at the meeting; ante, p. 1244.

(b) The 3 Geo. 4, c. 126, gives this

form; ante, p. 1252.

(c) The 3 Geo. 4, c. 126, gives this form, ante, p. 1224.

"C. D." in case the trustees shall think fit to name the person] for the making and erecting such engine, and to inspect, and take care, that the same is properly done; and we do order the gate-keeper at the said gate or bar for the time being to attend the said weighing engine, and carefully to weigh all carriages passing loaded upon the said road, at the place where such engine shall be erected, together with the loading thereof, and to take the several additional tolls or rates for overweight, and give tickets of the weight of such carriages and loading, when required by the driver thereof, and also to enter in a separate book, to be kept by him for that purpose, an account of every carriage so weighed, which shall, with the loading, exceed the weights allowed by the said act, and account to us for the money received for all such overweight.

21. Forms.

	SUMMER.		WINTER.	
	Tons.	Cwts.	Tons.	Cwts.
For every waggon with nine-inch wheels . . .	6	10	6	0
For every cart with nine-inch wheels . . .	3	10	3	0
For every waggon with six-inch wheels . . .	4	15	4	5
For every cart with six-inch wheels . . .	3	0	2	15
For every waggon with wheels of the breadth of four inches and a half . . .	4	5	3	15
For every cart with wheels of the breadth of four inches and a half . . .	2	12	2	7
For every waggon with wheels of less than four and a half inches . . .	3	15	3	5
For every cart with wheels of less than four and a half inches . . .	1	15	1	10

(91.) Table of weights allowed in winter and summer to carriages directed to be weighed (including the carriage and loading), by stat. 4 Geo. 4, c. 95 (a).

At a meeting of the trustees of the turnpike roads, under an act passed in the year of the reign of King George the , for [state the principal part of the title of the act], and also of the trustees of the turnpike roads, under an act, passed in the year of the reign of King George the , for [£c., as above] held at , the day of , for the purpose of agreeing upon and ordering a weighing engine at the joint expense of the trustees, for the use of the said several turnpike roads, pursuant to the powers given by an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads.

(92.) Agreement between trustees of different turnpike roads for erecting one weighing engine for the use of such roads (b).

It appearing to us that a weighing engine may be erected at [describing the spot where it can be most conveniently placed], which will accommodate both the said turnpike roads, according to the true intent and meaning of the said act: We do therefore order, &c. [as in the form above mentioned], and we do hereby agree and order, that the expenses of making and erecting the said weighing engine, and the sum of , which we do hereby agree and order shall be paid to the toll gatherer attending the said toll-gate, for the time being, weekly for his extraordinary trouble in attending the said weighing engine, shall be advanced and paid by the treasurers of the said several turnpike roads, in the shares and proportions following: viz. that the treasurer of the road shall pay [one-half], [two-thirds], [three-fourths], parts thereof, [as the trustees shall agree] and the treasurer of the road shall pay the remaining [one-half], [one-third], or, [one-fourth], part thereof; and that the money to be received at the said weighing engine by forfeitures for overweight shall be paid to the said respective treasurers in the like proportions, and applied by them for the use of the said respective turnpike roads.

(Signed.)

See the general form of commencement, and conclusion of informations, (93. Information and convictions, post (Nos. 115, 116). State the offence thus:] That C. D. of &c., on &c., at &c., being then and there the collector of tolls at a certain gate called , upon a certain turnpike road there situate, called , did and conviction against collector for extortion (c).

(a) The 4 Geo. 4, c. 95, s. 89, gives this form.

form; ante, p. 1224.

(b) The 3 Geo. 4, c. 126, gives this

(c) See Archbold's forms of Convictions; and ante, p. 1250.

21. Forms.

demand and take from one E. F. the sum of _____, as and for toll for [one horse, on which the said E. F. was then and there riding], for passing through the said gate, the same toll being a greater toll than he was then authorised to demand and take from the said E. F. for the said horse passing through the said gate as aforesaid, by virtue of the powers of any act or acts of Parliament, or of the orders and resolutions of the trustees or commissioners of the said turnpike road, acting under and by virtue of a certain act of Parliament made and passed in the _____ year of the reign of his late Majesty King _____, intituled [title of local act], made in pursuance of any act or acts of Parliament contrary to the form of the statute in such case made and provided.

(94.) The like on 4 Geo. 4, c. 97, s. 30, against collector for not putting up his name on toll-house (a).

State the offence thus:—That C. D., of &c., on &c., at &c., in the said county, being then and there a toll collector at a certain gate and toll-house called _____ on a certain turnpike road there situate, called _____, did not place or cause to be placed on the front of the said toll-house there situate, at which he the said C. D. was then stationed, his Christian name and surname, painted in black on a board with a white ground; contrary to the form of the statute in such case made and provided.

(95.) The like on, 3 Geo. 4, c. 126, s. 22, for obstructing the weighing of a cart (b).

State the offence thus:—That C. D., of &c., on &c., at &c., being then and there the driver of a certain waggon [“cart,” or “carriage”] [on a certain turnpike road, called _____, leading from _____ to _____, did then and there refuse to allow the same to be weighed by one E. F., then being the keeper of a certain toll-gate [or, “bar”], called _____, situate on the said turnpike road, and in the county aforesaid, at which toll-gate [or, “bar”], a weighing machine was then and there erected, pursuant to the statute in such case made and provided, [or, “then and there resisted one E. F., the then keeper of a certain toll-gate [or, “bar”] called _____, and situate on the said turnpike road, and in the county aforesaid, at which toll-gate [or, “bar”] &c. as above contrary to the statute,] &c. (See post, No. 106.)

(96.) The like on 3 Geo. 4, c. 126, s. 41, for evading toll (c).

State the offence thus:—That C. D., of &c., on &c., at &c., did [fraudulently pass through a certain toll-gate called _____, on a turnpike road there situate, called _____, with a certain horse, which the said C. D. was then riding, without paying the toll then and there payable for the same, by reason whereof the payment of the said toll was then and there avoided: or stating some other offence within stat. 3 Geo. 4, c. 126, s. 41]; contrary to the form of the statute made in the third year of the reign of King George the Fourth, &c. &c.

VI. FORMS AS TO INJURIES AND ANNOYANCES TO ROADS.

(97.) Notice from surveyor to cleanse ditches, &c. (d).

I, A. B., surveyor of the turnpike road, [describing it], do hereby give you notice, and require you, forthwith, “To [make, scour, cleanse and keep open], to the depth of _____ feet, and of the breadth of _____ feet, [or, ‘of sufficient depth and breadth for the keeping the said turnpike road dry, and conveying the water from the same’], a certain ditch, drain, or watercourse, [or, ‘the several ditches, drains, and watercourses’], running through the land or grounds occupied, by you at _____, adjoining to [or, ‘lying near’] the said turnpike road, and through which said lands or grounds the water hath heretofore been used to pass from the said turnpike road.”

(98.) Notice from him to remove filth, &c. (e).

“To remove the filth [dung, ashes, rubbish, or, any other matters or thing whatsoever] laid or thrown upon the said turnpike road, [or, ‘on a certain open

(a) See p. 1189.

(b) See p. 1224.

(c) See p. 1224. See also sect. 139, p. 1248.

(d) See p. 1258. See these notices in *Bateman's Turnpike Acts*.

(e) See p. 1262.

common or waste land, within eighty feet of the centre of the said turnpike road', lying between and , in the [parish, &c.] of , to the annoyance of the said turnpike road." 21. Forms.

"To turn and rectify the course of a certain watercourse, [sink, or, drain], belonging to you, [or, 'to land occupied by you'], at , in the [parish, &c.] running into, along, or out of the said turnpike road, to the prejudice thereof." (99.) Notice from him to turn a drain, &c. (a).

"To make and lay a good and sufficient trunk [tunnel, plat, or, bridge] at , &c., where a certain carriageway [or, 'footway'] leads out of the said turnpike road into the lands or grounds adjoining thereto, occupied by you." (100.) The like to make a tunnel (b).

"To cut, prune, and trim to the height of six feet from the surface of the ground, all the hedges belonging to you as the owner or occupier of land next adjoining to the said turnpike road; and also to cut down, prune, or lop the branches of trees, bushes, and shrubs, growing in or near such hedges or other fences adjacent thereto, in such manner that the said turnpike road shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such turnpike road to the damage thereof." (101.) The like to prune, &c., a hedge, &c. (c).

See order hereon, post.

I, A. B., [&c. as above], do hereby give you notice, "That the door [or, 'gate'], of a certain building, [park, paddock, field, or, inclosure], situate between and , is now made to open into or towards the said turnpike road, [or, 'a certain footpath belonging to the said turnpike road'], and the hanging post whereof is not fixed or placed so far from the centre of the said turnpike road, as that no part of such door or gate, when open, projects over such turnpike road [or, 'footpath'], contrary to the meaning of an act passed in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads. And I do therefore hereby give you notice, and require you forthwith to cause such door [or, 'gate'] to be hung so that no part of the same, when open, shall project over any part of such turnpike road [or, 'footpath'], according to the directions of the said act," &c. (102.) The like to remove, &c., a gate, &c. (d).

County of } Whereas complaint hath been made unto me, J.P., esquire, one of her Majesty's justices of the peace in and for the county of , acting within the hundred of , upon the oath of A. S., surveyor of the turnpike road, [describing it], that B. O., of , hath had due notice from him the said surveyor, to cut, prune, and trim the hedges belonging to the said B. O., as the owner [or, "occupier" of certain land at , and next adjoining to the said turnpike road, to the height of six feet from the surface of the ground, and also to cut down, prune, or lop the branches of the trees, bushes, and shrubs growing in or near such hedges or other fences adjacent thereto, in such manner that the said turnpike road should not be prejudiced by the shade thereof, and that the sun and wind might not be excluded from the said turnpike road, to the damage thereof, pursuant to the statute made in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads; but that he the said A. B. hath not complied with such notice, or with the requisites of the said Act. And whereas the said B. O., having been duly summoned to answer the said complaint hath appeared, (by N. P. his agent) pursuant to such summons, [or, "hath made default in his appearance"]: and it appearing to me that the said B. O. has not complied with the requisites of the said act in that behalf, I, the said justice, upon hearing the said A. S., and B. O. [or, "in default of his appearance, upon having due proof of the service of the said summons"], and considering the circumstances of the case, do order that the said (103.) Order to cut down trees, &c. (e).

(a) See p. 1259.
(b) See p. 1258.
(c) See p. 1260.

(d) See p. 1262.
(e) See form, Bateman's Turnpike Acts, and p. 1261.

21. *Forms.*

hedges shall forthwith be cut, pruned, and trimmed by the said B. O. to the height of six feet from the surface of the ground; and that the said branches of trees, bushes, and shrubs growing in or near the said hedges or other fences adjacent thereto, shall forthwith be cut down, pruned, and topped by the said B. O., in such manner that the said turnpike road shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from the said turnpike road to the damage thereof. And I do further order that, in case the said B. O. shall not obey this order within ten days from the date hereof, that then the said A. S. do cut, prune, and trim such hedges, and cut down, prune, or trim such branches of trees, bushes, and shrubs, in the manner directed by this order, and according to the directions of the said act, and proceed against the said B. O. for recovery of the penalties and charges he will thereby incur.

Given under my hand and seal, this day of , 18 .
J. P. (L. S.)

(104.) Information or conviction, on 3 Geo. 4, c. 126, s. 118, for encroaching on road by a hedge (a).

See the general form of commencement and conclusion of informations and convictions, *post*, (Nos. 115, 116), which will here apply. State the offence thus:—*That A. B. of , in the said county, informeth me, J. P. that C. D., of &c., on &c., at &c., did make [or, “cause to be made”] a certain hedge at the side of a certain turnpike road, there situate, called , in such manner as to reduce the breadth and confine the limits thereof [or otherwise describing some other offence within stat. 3 Geo. 4, c. 126, s. 118]; contrary to the statute made in the third year of the reign of King George the Fourth, intituled, An Act, &c.*

(105.) The like on 3 Geo. 4, c. 126, s. 113, for not cleansing ditches &c. (b)

State the offence thus:—*That C. D., of &c., on &c., at &c., occupying then [and from thence hitherto] certain lands and grounds adjoining to and lying near a certain turnpike road, there situate, called , through which said lands and grounds the water hath used to pass from the said turnpike road, did not, after ten days’ notice to him in that behalf duly given, or at any time before the expiration of such notice, open, cleanse, and scour the ditches, water-courses, and drains, for such water to pass without obstruction, but therein made default; contrary to the statute made in the third year of the reign of King George the Fourth, &c., &c.*
J. P.

(106.) The like on 3 Geo. 4, c. 126, s. 116, for not trimming a hedge (c).

State the offence thus:—*That C. D., of &c., on &c., at &c., occupying then and there certain lands next adjoining to a certain turnpike road there situate, called , did not within ten days after the making of a certain order by me in that behalf, and notice thereof to him the said C. D. duly given, cut, prune, and trim his hedges to the height of six feet from the surface of the ground [or, “cut down, prune, and trim certain branches of trees, bushes and shrubs, growing in and near to his hedges and other fences adjacent thereto”], (the said fences, trees, bushes, and shrubs not being in any garden, orchard, plantation, walk or avenue to a house, nor being trees, bushes or shrubs, which were an ornament or a shelter to a house), [or, (the said branches then and there hanging over the said road, in such manner as to impede and annoy carriages and persons travelling thereon)], as he the said C. D. was directed and required by the said order; contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, &c., &c.*

(107.) The like on 3 Geo. 4, c. 126, s. 114, for laying rubbish, &c., on road (d).

State the offence thus:—*That before the commission of the offence herein-after mentioned, to wit, on &c., at &c., C. D., of &c., did lay and throw a large quantity of filth and rubbish upon a certain turnpike road there situate, called , which the surveyor of the said turnpike road did then and there cause to be removed; and that the said C. D., after the removal of the said annoyance, to wit, on the day of aforesaid, at , in the county aforesaid, did lay and throw upon the said turnpike road a certain other large quantity of filth and rubbish [or stating some other offence within stat. 3. Geo. 4, c. 126, s.*

(a) See p. 1261.

(b) See form, *Archbold’s Forms of Convictions*, p. 220; and *ante*, p. 1268.

(c) See form, *Archbold’s Forms of Convictions*; and *ante*, p. 1261.

(d) *Ante*, p. 1262.

114]; contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, &c., &c. 21. Forms.

State the offence thus:]—That C. D., of &c., on &c., at &c., in the said county did wilfully break [“cut down,” “pull up,” or, “damage”] a certain direction post, set up and placed near the side of a certain turnpike road there situate, called , by the trustees [or, “commissioners”] of the said turnpike road, according to and in pursuance of the statute made in the third year of the reign of his late Majesty King George the Fourth [or stating some other offence within stat. 3 Geo. 4, c. 126, s. 119]; contrary to the said statute, &c., &c. (108.) The like on 3 Geo. 4, c. 126, s. 119, for damaging mile stones, posts, &c. (u).

State the offence thus:]—That C. D., of &c., on &c., at &c., upon a certain turnpike road there situate, called , without being thereto authorised by the surveyor or surveyors for the time being acting under any act, did shovel up [“scrape,” “gather,” or, “carry away”], a certain large quantity, to wit, one cart load of stone [“gravel” or “sand,” &c.], (see ante, p. 1275), from off the said turnpike road [or stating some other offence within stat. 4 Geo. 4, c. 95, s. 72]; contrary to the statute made in the fourth year of the reign of his late Majesty King George the Fourth, intituled, An Act to explain and amend an act passed in the third year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England. (109.) The like on 4 Geo. 4, c. 95, s. 72, for taking away scrapings, &c. of road (b).

State the offence thus:]—That C. D., of &c., on &c., at &c., did ride upon a certain footpath (or, “causeway,”) by the side of, and adjacent to, a certain turnpike road there situate, called , and made and set apart for the use and accommodation of foot passengers there [or stating some other offence within stat. 3 Geo. 4, c. 126, s. 121]; contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, &c., &c. (110.) The like on 3 Geo. 4, c. 126, s. 121, for riding on footpath (c).

State the offence thus:]—That C. D., of &c., on &c., at &c., being then and there the driver [and owner] of a certain waggon [or, “cart”], did then and there ride upon the said waggon [or, “cart”], in and upon a certain turnpike road there situate, called , not having then and there any other person on foot or on horseback to guide the said waggon [or, “cart”], and such waggon not being then and there such a light cart as is usually driven with reins, and is then conducted by some person holding the reins of the horse or horses drawing the same [or stating some other offence within stat. 3 Geo. 4, c. 126, s. 132]; contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, &c., &c. (111.) The like on 3 Geo. 4, c. 126, s. 132, for riding on waggon, &c. without guide (d).

State the offence thus:]—That before, and at the time of the committing of the offence hereinafter mentioned, a certain order before then duly made by the trustees [or, “commissioners”] of a certain turnpike road, called , situate in the parish of , in the county aforesaid, was in force, whereby it was ordered and directed, that in all cases where any waggon or cart should descend any hill or hills on the said road, with either of the wheels locked, a skidpan or slipper should be used or placed at the bottom of such wheel during the whole time of its being so locked, in such manner as to prevent the said road from being destroyed or injured by the locking of such wheel; and a copy of the said order had been at the time of the committing of the offence hereafter mentioned affixed on all the turnpike gates on the said road, for more than thirty days; and that afterwards, and whilst the said order was so in force as aforesaid, to wit, on the day of , in the year aforesaid, at the parish aforesaid, in the county aforesaid, C. D., of , in the said county, did then and there drive and act as the driver of a certain waggon down a certain hill upon the said turnpike road, (112.) The like on 3 Geo. 4, c. 126, s. 126, for not using skidpans (e).

(a) Ante, p. 1216.

(b) Ante, p. 1275.

(c) Ante, p. 1274.

(d) See form, Archbold's Forms of Convictions; and ante, p. 1273.

(e) Ante, p. 1273.

21. *Forms.*

with one of the wheels of the said waggon locked, without using or having such skidpan or slipper at the bottom of such wheel, in manner as by the said order was ordered and directed as aforesaid; contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, &c., &c.

(113.) The like on 4 Geo. 4, c. 95, s. 15, for not having name painted on waggon (a).

State the offence thus:—*That C. D., of &c., on &c., at &c., did use [or, "allow to be used"], by one E. F., a certain waggon ["wain, cart, or other such carriage"] of the said C. D., upon a certain turnpike road there situate, called : and that the said C. D. did not, before he used [or, allowed to be used by the said E. F.] the said waggon [&c. as above] upon the said turnpike road, paint, or cause to be painted, in one or more conspicuous line or lines, upon any conspicuous part of the right or off-side of the said waggon, or upon the off-side shaft or shafts thereof, his Christian name and surname, and the place of his abode, or the Christian and surname, and place of abode, of the principal partner or owner of the said waggon [or, "wain," &c.], at full length, in large legible letters not less than one inch in height; and the said C. D. then and there used [or, "allowed to be used," by the said E. F.] the said waggon [or, "wain," &c.], upon the said turnpike road, without the names and descriptions painted thereon, as aforesaid; contrary to the statute made in the fourth year of the reign of his late Majesty King George the Fourth, intituled, An Act to explain and amend an act passed in the third year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England.*

See form for evasion of tolls, *ante* (No. 96).

VII. GENERAL FORMS OF CONVICTIONS, &c.

(114.) Summons to attend a justice (b).

County of } To A. B., of
to wit.

Whereas complaint and information have been made before me, C. D., one of her Majesty's justices of the peace for the said county, &c.] by E. F., of that, &c. [here state the nature and circumstances of the case, as far as it shall be necessary to show the offence, and bring it within the authority of the justice, and, in doing that, follow the words of the act as near as may be]; these are therefore to require you personally to appear before me [or, "the justices to be assembled at their special sessions to be holden"] at , in the said county, &c.], on the day of next, at the hour of , in the noon, to answer to the said complaint and information by the said E. F., who is likewise directed to be then and there present, to make good the same. *Hercin fail not.*

Given under my hand this day of .

(115.) Information (c).

County of } Be it remembered, that on the day of , A. B.,
to wit. } of , in the said county, informeth me, one of her Majesty's justices of the peace for the said county, that , of , in the said county [here describe the offence, with the time and place, and follow the words of the act, as near as may be]; contrary to the statute made in the third year of the reign of King George the Fourth, for regulating turnpike roads, which hath imposed a forfeiture of , for the said offence.
Taken the day of , before me, A. B.

(116.) Conviction (d).

County of } Be it remembered, that on the day of , in the
to wit. } year of the reign of , and in the year of our Lord , A. B. is convicted before me , one of her Majesty's justices of the peace for the said county, for [here specify the offence, and when and where committed (e)], contrary to the form of the statute made in the year of the

(a) See form, *Archbold's Forms of Convictions*.

(b) The 3 Geo. 4, c. 126, gives this form; *ante*, p. 1277.

(c) The 3 Geo. 4, c. 126, gives this form; *ante*, p. 1277.

(d) The 3 Geo. 4, c. 126, gives this form; see *ante*, p. 1279.

(e) In specifying the offence it is necessary to state the place and the county in which it is committed, in order to give the magistrate jurisdiction.

reign of _____, intituled [here set forth the title of the act (a)]; and I do hereby declare and adjudge that the said A. B. hath forfeited, for the said offence, the sum of _____, [or, "shall be committed to _____ for the space of _____," as the case may be].

21. Forms.

Given under my hand and seal, the day and year first above written.

C. D. (l. s.)

To the [“constable,” “headborough,” or, “tithingman”] of _____ County of _____ } Whereas A. B., of _____, in the said county, is this day (117.) Warrant to
to wit. } convicted before me, C. D., esquire, one of her Majesty’s jus- distrain for for-
tices of the peace in and for the said county, upon the oath of G. H., a credible seiture (a).
witness, for that the said A. B. hath [here set forth the offence, describing it particularly in the words of the statute, as near as may be], (contrary to the statute in that case made and provided), by reason whereof the said A. B. hath forfeited the sum of _____, to be distributed as herein is mentioned, which he hath refused to pay; these are, therefore, in her Majesty’s name, to command you to levy the said sum of _____, by distress of the goods and chattels of him the said A. B.; and if within the space of four days next after such distress by you taken, the said sum, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay one-half of the said sum of _____ to E. F., of _____, who informed me of the said offence, and the other half of the said sum of _____ to I. K., the surveyor of the turnpike road [describing it] where the said offence [“neglect,” or, “default”] happened, to be employed towards the repair of the said road, returning the overplus on demand to him the said A. B. (the reasonable charges of taking, keeping, and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said A. B., whereon to levy the said sum of _____, that then you certify the same to me, together with this warrant.

Given under my hand and seal, the _____ day of _____.

C. D.

I, A. B., constable of the [parish, &c.] of _____, in the county of _____, do hereby certify and make oath, that by virtue of this warrant I have made diligent search for the goods of the within-named _____, and that I can find no sufficient goods whereon to levy the within sum of _____. As witness my hand, the _____ day of _____.

(118.) Return of constable upon the warrant of distress, where no effects (b).

A. B.

Sworn before me, the day and year, &c. C. D.

County of _____ } To the [constable] of _____, in the said county, and to the (119.) Commit-
to wit. } keeper of the common gaol [or, “the house of correction”] at _____ ment for want of
, in the said county. } distress (c).

Whereas A. B., of _____, in the said county, was, on the _____ day of _____ convicted before me, C. D., esquire, one of her Majesty’s justices of the peace in and for the said county, upon the oath of E. F., a credible witness, for that he the said A. B. [here set forth the offence], contrary to the statute made in the third year of the reign of his late Majesty King George the Fourth, for regulating turnpike roads, by reason whereof the said A. B. hath forfeited the sum of _____: And whereas on the _____ day of _____, in the year aforesaid, I did issue my warrant to the [constable] of _____, to levy the said sum of _____, by distress and sale of the goods and chattels of him the said A. B., and to distribute the same according to the directions of the said statute: And whereas it duly ap-

tion, by showing it to be within the county for which he acts. (R. v. *Hazell*, 13 East, 139; *Kite and Lane’s case*, ante, “Conviction.”)

(a) This must be correctly set forth. (*Mills v. Wilkins* 2 Salk. 609.)

(b) This must be directed to the

proper officer, and executed within his district. See “*Distress under Justice’s Warrant*.” The 3 Geo. 4, c. 126, gives this form, p. 1277.

(c) The 3 Geo. 4, c. 126, gives this form, ante, p. 1277.

Highways, Turnpike.

21. *Forms.* *pears to me, upon the oath of the said [constable], that the said [constable] hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same; these are therefore to command you the said [constable] of , aforesaid, to apprehend the said A. B., and him safely to convey to the common gaol [or, "house of correction"] at , in the said county, and there deliver him to the keeper thereof, together with this precept: And I do also command you the said keeper to receive and keep in your custody the said A. B. for the space of three months, unless the said sum shall be sooner paid, pursuant to the said conviction and warrant, and for so doing this shall be your sufficient warrant. Given under my seal, the day of , in the year of our Lord*

C. D.

VIII. APPEAL.

- (120. Notice of appeal to quarter sessions (a). *A. B. take notice, that I intend to appeal to the next general quarter sessions of the peace to be holden for the [county, &c.] of , against an order [conviction, or other proceeding], (as the case may be) [particularly specifying the purport of such order, &c., and assigning the grievance and cause of complaint]. Dated the day of .*

C. D.

Homicide.

What.

HOMICIDE, in law, signifies the killing of a man by a man. (1 *Hawk.* c. 26, s. 2.) And it includes in it, every offence which, before 9 Geo. 4, c. 31, would have amounted to petty treason (24 & 25 Vict. c. 100, s. 8), and also the several offences which are treated of in the following sections. There is also another kind of untimely death of a man, not properly homicide; when he is killed by a horse, a cart, a tree, or the like, and not by a man, which is called casual death.

As to attempts to murder or to do bodily harm, see "*Malicious Injuries to Persons.*"

Herein of—

- I. *Justifiable Homicide*, p. 1313.
- II. *Homicide by Misadventure*, p. 1316.
- III. *Manslaughter*, p. 1319.
- IV. *Murder*, p. 1327.
 1. *The Offence*, p. 1327.
 2. *Indictment*, p. 1332.
 3. *Evidence*, p. 1332.
 4. *Place of Trial*, p. 1333.
 5. *Punishment, Sentence, Execution, and Treatment of Murderers*, p. 1339.
 6. *Escape of Murderers*, p. 1339.
- V. *Self-murder*, p. 1339.
- VI. *Attempts to Murder*, p. 1341.
- VII. *Forms*, p. 1341.

(a) The 3 Geo. 4, c. 126, gives this form, *ante*, p. 1278. See as to appeals in general, "*Appeal*," and the forms at the end of this title.

I. Justifiable Homicide.

To make homicide justifiable, it must either be occasioned by an act done by the permission of the law, or be owing to some unavoidable necessity, to which the person who kills another must be reduced, without any manner of fault in himself. (1 *Hawk.* c. 28, s. 1.) And there must be no malice coloured under pretence of necessity; for whenever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder. (*Id.* s. 2.)

Homicide committed by the proper officer in the execution of a criminal in strict conformity with his sentence, is justifiable. (4 *Bla. Com.* 178; 1 *Hale*, 504.)

Homicide necessarily committed by an officer or other person acting in his aid in the legal exercise of a particular duty, which the person resists or prevents him executing, is, in general, justifiable. As, if rioters, or forcible enterers or detainers, stand in opposition to the justices' lawful warrant, and any of them be slain, it is no felony. (*Hale's Sum.* 37.) So, if they stand in opposition to the sheriff's *posse comitatus*. (*Vide* stats. 13 Hen. 4, c. 7; 2 Hen. 5, c. 8; 1 *Hale*, 53.) And if the sheriff or magistrate, or any one coming in aid of them, be killed, it is murder in all. (*Crompt.* 22; 1 *M. S. Sum.* 219.)

So, if a person, having actually committed a felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. (1 *Hawk.* c. 28, s. 11.)

So, if a felony hath actually been committed, and an officer or minister of justice, having lawful warrant so to do, arrest an innocent person, and such person assault the officer or minister of justice, the officer is not bound by law to give back, but to carry him away; and if, in execution of his office, he cannot otherwise avoid it, but in striving to kill him, it is no felony. And in that case, the officer or minister of justice shall forfeit nothing; but the party who so assaulted or offered to fly away, and is killed, shall forfeit his goods. (3 *Inst.* 56.)

But if the warrant were illegal and void upon the face of it (see 1 *Hale*, 459; 1 *East*, P. C. 310), or issued with a blank in it, and the blank afterwards filled up (*R. v. Stockley*, 1 *East*, P. C. 310; and see *Housin v. Barrow*, 6 T. R. 122; *R. v. Winwick*, 8 *Id.* 454; *R. v. Hood*, *Moody*, C. C. 281), or issued with an insufficient description of the defendant, as, for instance, if it were to take the son of J. S. L. (*Ib.*), or attempted to be executed against C. instead of B., the killing would be manslaughter.

Also, if a person arrested for felony break away from those who are conducting him to gaol, they may kill him, if they cannot otherwise take him. But in this case, likewise, there must have been a felony actually committed. (*Hale's Sum.* 36, 37.) Also, if a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the fray. (1 *Hawk.* c. 28, s. 13.)

But in civil cases, and also in cases of breach of the peace or other misdemeanor short of felony, if the officer should pursue a man flying in order to take him, and should kill him in the pursuit (*Fost.* 271; 1 *Hale*, 411; 2 *Hale*, 117); or if a press-gang kill a seaman or other person flying from them (*R. v. Browning*, 1 *East*, P. C. 312; and see *Id.* 308; *R. v. Borthwick*, 1 *Doug.* 207); the killing in these cases would be murder—unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel or other weapon not likely to kill, or the like, in which case the homicide, at most, would be manslaughter only. (See *Fost.* 271.)

If an officer or private person attempt to interfere to suppress an

1. Justifiable homicide.

On a real necessity.

In execution of a criminal.

In execution of duty of officer, of process, &c.

In arrest of felons.

In arrest of prisoners escaping.

In arrest of persons guilty of misdemeanors, &c.

1. *Justifiable homicide.*

On civil process.

affray, and be resisted, and kill the person resisting, this also is justifiable homicide. (1 *Hale*, 481, 484; *Fost.* 274.)

In civil cases, although the sheriff cannot kill a man who flies from the execution of a civil process, yet if he resist the arrest, the sheriff or his officer need not give back, but may kill the assailant. (*Hale's Sum.* 37.) So if, in the arrest and striving together, the officer kill him, it is no felony. (*Hale's Sum.* 37.)

In prevention of crime, &c.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As, if a man come to burn my house, and I shoot out of my house, or issue out of my house, and kill him. (*Hale's Sum.* 39.) So, if A. makes an assault upon B., a woman or maid, with intent to ravish her, and she kills him in the attempt, it is *se defendendo*, because he intended to commit a felony. (1 *Hale*, 485; *Hale's Sum.* 39.)

And not only the person upon whom a felony is attempted, may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified. (1 *Hale*, 481, 484; *Fost.* 274; *Handcock v. Baker*, 2 B. & P. 265.)

But the intent to commit a felony should be apparent and not be left in doubt, otherwise the homicide will be manslaughter at least (1 *Hale*, 484); and the rule does not extend to felonies without force, such as picking pockets (1 *Hale*, 488), nor to misdemeanors of any kind. (1 *Hale*, 485-6; 1 *Hawk. P. C.* c. 28, s. 23.)

Necessity must exist.

It should be observed, too, that, as the killing in these cases is only justifiable on the ground of necessity, it cannot be justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen-roost; for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him. (*R. v. Scully*, 1 C. & P. 319.) Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity. (*Meade's Case*, 1 *Lew.* 184.)

Trial and discharge.

In all cases of justifiable homicide, the party upon arraignment, having pleaded not guilty, the special matter must be found; whereupon the party shall be dismissed without any forfeiture or pardon purchased (*Hale's Sum.* 38); and see the 24 & 25 Vict. c. 100, s. 7, *infra*, confirming this law.

Homicide *se defendendo*.

Homicide in self-defence, *i. e.* homicide committed *se et sua defendendo*, in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods. But now, by the stat. 24 & 25 Vict. c. 100, s. 7, "no punishment or forfeiture shall be incurred by any person who shall kill another by *misfortune*, or in *his own defence*, or in any other manner *without felony*." And even before this act the practice was to direct an acquittal. There appears, therefore, no longer any reason for distinguishing this from *justifiable* homicide.

What.

Homicide in a man's own defence seems to be, where one, who hath no other possible means of preserving his life from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. (1 *Hawk.* c. 29, s. 13.)

Cases of *se defendendo*.

And not only he, who upon an assault retreats to a wall, or some such strait, beyond which he can go no further before he kills the other, is judged by the law to act upon unavoidable necessity, but also he,

who, being assaulted in such a manner and in such a place that he cannot go back without manifestly endangering his life, kills the other without retreating at all. (1 *Hawk.* c. 29, s. 14.)

And notwithstanding a person, who retreats from an assault to the wall, give the other wounds in his retreat, yet, if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. (1 *Hawk.* c. 29, s. 14.) But if the mortal wound were first given, then it is manslaughter. (*Hale's Sum.* 42.)

And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact, without ever going back at all. (1 *Hawk.* c. 29, s. 16.)

But if a person, upon malice *prepense*, strike another, and then fly to the wall, and there in his own defence kill the other, this is murder. (*Hale's Sum.* 42.)

Before a person can avail himself of the defence that he used a weapon in defence of his life, he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified. (*Reg. v. Smith*, 8 C. & P. 160; *Reg. v. Bull*, 9 C. & P. 22.)

Under the excuse of self-defence the principal civil and natural relations are comprehended: therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are justified; the act of the relation being construed as the act of the party himself. (1 *Russ. on Cri.* 888, 4th *Edn.*; 1 *Hale*, 484; 4 *Bl. C.* 186.)

Chance medley, or as it was sometimes written, *chaud medley*, has been often indiscriminately applied to any manner of homicide by misadventure; its correct signification seems to be, a killing happening in a sudden rencounter: it will be manslaughter or self-defence according to whether the slayer was actually striving and combating at the time the mortal stroke was given, or had *bonâ fide* endeavoured to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction: in the latter case it will be justifiable or excusable homicide—in the former manslaughter. (1 *Russ. on Cr.* 888, 4 *Edn.*; 4 *Bl. Com.* 184.)

It has been seen that a man is not justified in killing a mere trespasser; but if, in attempting to turn him out of his house he is assaulted by the trespasser, he may kill him, and it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession (1 *Hale*, 486), and in such a case a man need not fly as far as he can as in other cases of *se defendendo*, for he has a right to the protection of his own house. (1 *Hale*, 485.)

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been held an unjustifiable mode of doing so (*Child's case*, 2 *Lew.* 214); throwing a stone has been held a proper mode. (*Hinchcliffe's case*, 1 *Lew.* 161.)

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: as, for instance, that case mentioned by Lord Bacon (*Elem.* c. 5; see also 1 *Hawk.* c. 28, s. 26,) where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, and he is drowned: this homicide is excusable

1. *Justifiable homicide.*

Defence of property against trespassers.

Reasonable force only must be used.

Homicide upon unfortunate necessity.

2. *Homicide by misadventure.* through unavoidable necessity, and upon the principle of self-defence.

Accessaries.

Hereof there can be no accessaries either before or after the fact, because it is not done with a felonious intent, but upon inevitable necessity. (3 *Inst.* 56; see title "*Accessory.*")

Forfeiture.

As to forfeiture of the offender's goods, see *ante*, FORFEITURE.

II. Homicide by Misadventure.

What is homicide by misadventure.

Homicide by misadventure is where a man is doing a lawful act, without intent to hurt another, and death casually ensues. (*Hale's Sum.* 31; 1 *East's P. C.* 221.) As, where a labourer, being at work with a hatchet, and the head flies off and kills one who stands by; or where a third person whips a horse on which a man is riding, whereupon he springs out and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow, of manslaughter. (1 *Hawk.* c. 29, s. 3.) But if a person riding in the street whip his horse to put him into speed, and run over a child and kill him, it is homicide, and not by misadventure; and if he ride so in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. (1 *Hale*, 476.)

Lawful acts must be done with caution.

It is not sufficient that the act upon which death ensues be lawful and innocent in itself. It must be done in a proper manner, and with due caution to prevent mischief. (*Fost.* 262; 1 *East's P. C.* 261.) Thus, a party causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, is guilty of manslaughter. (*R. v. Martin*, 3 *C. & P.* 211.)

Workmen throwing rubbish.

In the case of workmen throwing stones and rubbish from a house in the ordinary course of their business, by which a person underneath happens to be killed; if they deliberately saw the danger, or betrayed any consciousness of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death; for though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call for it in the instance put, the rule applies, *de non existentibus et non apparentibus eadem est ratio*. So, if any person had been before seen on the spot, but due warning were given, it will be only misadventure. (*Hull's case*, 1664; *Kel.* 40; 1 *Russ.* 769.) On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it, however loud. (1 *East's P. C.* 262.)

Driving carriages.

Again, if a person driving a carriage happens to kill another: if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally; there is the heart regardless of social duty. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused. (1 *East's P. C.* 263.) The mere calling out will not excuse the offender. (*R. v. Walker*, 1 *C. & P.* 320; 1 *East's P. C.* 63.) A. was driving a cart with four horses, in the highway at

Whitechapel, and, he being in the cart, and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her: *Holt, C. J., Tracy, J., Baron Bury*, and the Recorder *Lovel*, held this to be only misadventure. But, by Lord *Holt*, if it had been in a street where people usually pass, this had been manslaughter; but it was clearly agreed that it could not be murder. (*O. B. Sess. before M. T. 1704; 1 East, P. C. 263.*)

To make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there be sufficient light, and the captain of a steamer is either at the helm or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. (*R. v. Gree, 7 C. & P. 156.*) The captain and pilot of a steamboat were both indicted for the manslaughter of a person who was on board of a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to improper steerage of the steam-boat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain and pilot were both on the bridge between the paddle-boxes; according to another, the pilot was alone on the paddle-box. Held, that under these circumstances there was not such personal misconduct on the part of either as to make them guilty of felony. (*R. v. Allen and another, 7 C. & P. 153.*)

If, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter. (*Fost. 259; 1 Hale, 472; 1 Hawk. c. 29, s. 5; Ward's case, 1 East, P. C. 270.*) If the sport were lawful and not dangerous, it would be homicide by misadventure only. (*Id.*) But the sport or act from which death ensued must be *malum in se*. For, if it were barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment. (*Fost. 259.*)

Parents, masters, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care: and if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances. If done with a cudgel, or other things not likely to kill, though improper for the purpose of correction, it will be manslaughter: if with a dangerous weapon likely to kill or maim, as a pestle or great staff, it will be murder; due regard being had in both instances to the age and strength of the party. (*1 East's P. C. 261.*)

If poison were administered by mistake, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure. But if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter. (*1 Hale, 431.*) If a physician or surgeon give his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this also is neither murder nor manslaughter, but misadventure. (*Mirr. c. 4, s. 16.*) A distinction, indeed, has been taken, between the administering a potion, &c., by a regular physician, &c., and one who is not so, and the death in the latter case is said to be manslaughter at the least (*Brit. c. 5; 4 Inst. 251*); but

2. *Homicide by misadventure.*

Navigating ships.

Sports.

Correction by parents, &c.

Poisoning by mistake.

2. *Homicide by
misadventure.*Medical prac-
titioners.What degree of
caution must
be used.

Lord Hale very much questions the soundness of this distinction. (1 *Hale*, 430.) And it seems, that if a person, whether he be a regular practitioner or not, honestly and *bonâ fide* perform an operation which causes the patient's death, he is not guilty of manslaughter (*R. v. Van Butchell*, 3 C. & P. 629); but if he be guilty of criminal misconduct arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter. (*R. v. Williamson*, *Id.* 635; *R. v. Spiller*, 5 C. & P. 333; and see further *post*, p. 1325.)

The law does not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken; such as hath been found by long experience in the course of human affairs to answer the end; for such conduct shows that the party was regardful of social duty, and free from any manner of guilt. (*Fost.* 264; 1 *East's P. C.* 266.) And, therefore, upon that principle, Mr. Justice *Foster* denies *Rampton's case* (*Kel.* 41) to be law: and, indeed, there is a quære put to it in the margin of the report. The prisoner had found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer, which had gone down into the muzzle of the pistol; the rammer, in fact, being too short. He carried the pistol home, and his wife standing before him, he cocked it and touched the trigger; on which the pistol went off and killed the woman. This was ruled manslaughter. In truth, the man had used the ordinary precaution adapted to the probability of danger in such cases: he had examined the pistol by the usual method of trial. And though it was doubtless an idle frolic, yet the heart was free from all sort of guilt, even the guilt of negligence; and therefore the act ought to have been excused. And the same learned judge determined accordingly in a case something similar.

Upon a Sunday morning, a man and his wife going to dine at a friend's house in the neighbourhood, he carried his gun with him, to divert himself on his way; but before dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him; which was put into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger, and the gun went off, and killed his wife. It came out in evidence, that, while the man was at church, a person belonging to the family privately charged the gun, and went after some game; but before the service at church was ended, returned it loaded to the place from whence he had taken it; and where the defendant, who was ignorant of all that had passed, found it to all appearance as he had left it. Mr. Justice *Foster* thought it unnecessary to inquire whether the man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, he directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted. (*Fost.* 265.)

A gentleman came to town in a chaise, and before he got out of it, fired his pistols in the street, which by accident killed a woman. This was ruled manslaughter: the act was likely to breed danger, and manifestly improper. (*Burton's case*, 1 *Str.* 481; 1 *East's P. C.* 266.)

It has already been observed, that this homicide is only when it happeneth upon a man's doing a lawful act; for, if the act be done in the prosecution of a felonious intention, it will be murder. (1 *Russ.* 540.) For it is a general rule in case of all felonies, that, wherever a man intending to commit one felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. (1 *Hawk.* c. 29, s. 11.) As, if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, this is murder. (*Fost.* 258, 259.)

Unlawful acts.

Evil intent.

Further if there be an evil intent, though that intent extendeth

not to death, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slain. (3 *Inst.* 57.)

3. *Man-slaughter.*

But in all the cases above, if it doth only hurt a man by such an accident, it is nevertheless a trespass; and the person hurt shall recover his damages: for though the chance excuse from felony, yet it excuseth not from trespass. (1 *Hale*, 472.) Action for trespass.

This homicide is not felony, because it is not accompanied with a felonious intent, which is necessary in every felony. (1 *Hawk.* c. 29, s. 11.) This kind of homicide no felony.

Although this homicide is not properly a man's crime, but his misfortune, yet, because the queen hath lost her subject, and in respect of the great favour the law hath to the life of man, and to the end that men should use all care, diligence, and circumspection, in all they do, that no hurt should come of their actions, a person convicted hereof, before the 9 Geo. 4, c. 31, s. 10, forfeited his goods; by that statute he is exempted from all punishment, but it is wholly repealed by 24 & 25 Vict. c. 95. Forfeiture.

III. Manslaughter.

Manslaughter is thus defined—The unlawful killing of another without malice either express or implied: which may be either voluntarily, upon a sudden heat: or involuntarily, but in the commission of some unlawful act. (4 *Blac. Com.* 191; 1 *Hale*, 466; 1 *Hawk.* c. 30, s. 1; 1 *East's P. C.* 218.) Manslaughter, what.

There is no difference between murder and manslaughter, but that murder is upon *malice aforethought*, and manslaughter upon a sudden occasion.

As if 2 meet together, and, striving for the wall, the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the field and fought, and the one had killed the other, this had been but manslaughter, and no murder; because all that followed was but a continuance of the first sudden occasion, and the blood was never cooled till the blow was given. (3 *Inst.* 55.) If 2 persons quarrel and fight, and one runs away, and when the other overtakes him, he pulls out a knife and stabs him, if death ensue, this is manslaughter; but murder if he ran away with the intention of getting out the knife. (*R. v. Kessal*, 1 C. & P. 437; and see 1 *East*, P. C. 243; *R. v. Taylor*, 5 Burr. 2793; *R. v. Anderson*, 1 Russ. 447.) Where, after mutual blows between the defendant and the deceased, the defendant knocked the deceased down, and, after he was upon the ground, stamped upon his stomach and belly with great force, and thereby killed him: this was held to be only manslaughter. (*R. v. Ayes*, *R. & R.* 166.) Where the defendant and others quarrelled in a public house, and there was an affray amongst them, and the defendant threw the deceased on the ground and was beating him severely, when some person calling to him not to murder the man, he said, "Damn him, I will murder him," upon which one of the party gave the defendant a blow and knocked him down; the defendant then went into the yard, and in about a minute returned in a violent passion with a pitch-fork; in the meantime the deceased had armed himself with a fire-shovel, and had struck one of the defendant's party on the head, when the defendant, not seeing the blow, returned from the yard and from behind ran one of the points of the fork into the deceased's temple, of which he died; it was doubted by some of the judges whether this was more than manslaughter, and accordingly the Fighting.

3. *Manslaughter.*

First blow immaterial, if terms equal.

defendant was recommended for a conditional pardon. (*R. v. Rankin, R. & R. 43.*)

If upon a sudden quarrel the parties fight upon equal terms, it matters not who gives the first blow (1 *Russ. on Crimes*, and 1 *Hale*, 456), but it would be otherwise if the party killing began the attack under circumstances of undue advantage—as, if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword, and they fight, and B. is killed; A. would be guilty of murder: for this making the pass before B. had drawn his sword shows that he sought his blood. (*Fost. 295.*) So, where A. and B. quarrelled, and A. threw a bottle at B., and then drew his sword, and B. then threw the bottle back at A., and wounded him, upon which A. immediately stabbed him; this was holden to be murder. (*R. v. Mawgridge, Kel. 128.*)

But the terms need only be equal at the commencement of the fray; for if on any sudden quarrel blows pass, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter. (1 *East, P. C. c. 5, s. 26*; *R. v. Snow, 1 Leach, 151.*) But the conclusion will be different if there were any previous preparation, as if a person being in possession of a deadly weapon, entering into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be murder. (*Reg. v. Smith, 8 C. & P. 160.*)

And generally, if there be circumstances in the case indicative of malice in the party killing, it will be murder. Thus, if 2 persons quarrel and afterwards fight, and one of them kill the other—in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside, and reason to interpose, the killing would be murder. (*Fost. 296*; 1 *Hale, 453*; *R. v. Lynch, 5 C. & P. 324.*) Or if A. had formed a deliberate design to kill B., and after this they meet and have a quarrel, and many blows pass, and A. kill B., this will be murder, if the jury are of opinion that the death was in consequence of previous malice and not of the sudden provocation. (*Reg. v. Kirkham, 8 Car. & P. 115.*)

Third person interfering in combat of others;

If, when 2 persons are fighting, a third come up, and take the part of one of them, and kill the other; this will be manslaughter in the third party (1 *Hawk. c. 31, ss. 35, 36*); and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. (*Id. s. 55.*) If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. (1 *East's P. C. 291, 292.*) If, on the other hand, the third party who thus interferes be killed, it is but manslaughter. (*Id.*; and see 12 *Co. 87*; *Kel. 59.*)

to part them.

If a person interfere with intent to part combatants, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter. (1 *Hawk. P. C. c. 31, s. 56.*) So if he do more than is necessary to separate them. (*Rex v. Bourne, 5 C. & P. 120.*)

Aiming at one person, killing another.

If a blow aimed at one person light upon another, and kill him, the offence will be the same as if the person aimed at had been killed; thus a woman, in a fit of anger with her child, threw a poker at him, but struck another child who was entering the room at the moment, this was held manslaughter. (*Rex v. Conner, 7 C. & P. 438.*)

Provocation by words, &c.;

It seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty

of murder, who is so far transported thereby as immediately to attack the person who offends him in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defence or not. (1 *Hawk.* c. 31, s. 33.)

Nor can any provocation whatever render homicide justifiable, or even excusable; the least it can amount to is manslaughter. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only. (*Kel.* 135; 1 *Hale*, 466, *Fost.* 290.)

If a man pull another's nose, or offer him any other great personal indignity, and the other thereupon immediately kill him, it is manslaughter only. (*Kel.* 135; 4 *Bl. Com.* 191.) But slight provocation even by a blow will not extenuate the crime where the revenge is disproportioned to the injury, or outrageous and barbarous in its nature; as, if a man, upon being gently pushed by a policeman to make him move on when causing an obstruction, kill him, this is murder. (*Reg. v. Hagan*, 8 *C. & P.* 167; see also *Stedman's case*, *Fost.* 292; *R. v. Lynch*, 5 *C. & P.* 324.)

If a man take another in adultery with his wife, and kill him directly upon the spot, this is manslaughter merely. (1 *Hale*, 486; *R. v. Manning*, *T. Raym.* 212.)

So, if a father see another person in the act of committing an unnatural crime with his son, and instantly kill him, it is manslaughter only; but if, hearing of it, he go in quest of the party and kill him, it is murder. (*Reg. v. Fisher*, 8 *C. & P.* 182.)

Where a boy, after fighting with another, ran home bleeding to his father; and the father immediately took a small cudgel, and ran three quarters of a mile to the place where the other boy was, and struck him a single blow with the stick, of which blow the boy afterwards died; this was holden to be manslaughter only. (*R. v. Rowley*, 12 *Co.* 87; and see *Fost.* 294.) But the true grounds of this judgment seem to have been that the accident happened by a single stroke given in heat of blood, with a cudgel not likely to destroy, and that death did not immediately ensue.

An unwarrantable imprisonment of a man's person has been holden sufficient provocation to make a killing, even with a sword, manslaughter only. (*R. v. Buckner*, *Sty.* 467.) Therefore, where a constable took a man without warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J. S.: it was holden to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge; because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. (*R. v. Curvan*, *R. & M.* 132; see *R. v. Thompson*, *R. & M.* 88.) So where a creditor placed a man at the chamber door of his debtor, with a sword undrawn to prevent him from escaping while a bailiff was sent for to arrest him, and the debtor stabbed the creditor, this was held manslaughter. (*R. v. Withers*, 1 *East*, *C. P.* 233.)

Where a parent is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and he happens to occasion his death, it is only misadventure; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases (according to the circumstances) murder. (1 *Hale*, 473, 474.) In all cases where the correction is inflicted with a

by assault;

by adulterer;

by offence on
children;

by imprisonment.

Killing by
correction.

3. *Manslaughter.*

deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. (*Fost.* 262.) A mother, being angry with one of her children, took up a poker, and on his running to the door of the room, which was open, threw it after him and killed another child who was entering the room at the time; and it was holden to be manslaughter, although she did not intend to hit the child she threw the poker at, but merely to frighten him; because it was an improper mode of correction. (*R. v. Connor*, 7 C. & P. 438.) Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued; it was holden to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. (*R. v. Turner*, *Comb.* 407, 408; and see *R. v. Wigg*, 1 *Leach*, 378, n.; and *Anon*, 1 *East*, P. C. 261; *R. v. Leggett*, 8 C. & P. 191.)

And though the correction exceeds the bounds of moderation, the Court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must in all probability occasion death; though the party were hurried to great excess. As was the case of a father (*Worcester Sp. Ass.* 1775), whose son had frequently been guilty of stealing, complaints of which had come to the father, who had often corrected him. At length, the son being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son with a rope, by way of chastisement for the offence, so much, that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the father consulted his colleagues in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter, and so it was ruled. (1 *East's P. C.* 261.)

Correction of
seamen.

Persons on board a ship are necessarily subject to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter against the captain and mate of a vessel, for accelerating the death of a seaman really in ill health, but whom, they alleged, they believed to be a skulker, the question will be, in determining whether it is a slight or an aggravated case, whether the phenomena of the death were such as would excite the attention of reasonable and humane men; and, in such a case, if the deceased be taken on board after he was discharged from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. (*Reg. v. Leggett*, 8 Car. & P. 191.)

Other provoca-
tions.

And there are other instances where slight provocations have been considered as extenuating the guilt of homicide, upon the ground that the conduct of the party killing, upon such provocations, might fairly be attributed to an intention to chastise rather than to a cruel and implacable malice. But it must appear that the punishment was not urged with brutal violence. Thus, where A., finding a trespasser upon his land, in his passion beat him, and, unluckily, happened to kill him, it was holden to be manslaughter. (*Fost.* 291; 1 *Russ on Crimes.*)

So where a person, whose pocket had been picked, encouraged by a mob, threw the pickpocket into a pond, for the purpose of ducking him, but he was unfortunately drowned: this was holden to be manslaughter. (*R. v. Ray*, 1 *East*, P. C. 236.)

Nature of the
instrument used.

In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken into consideration; for if it

were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation to reduce the offence to manslaughter. So where a park-keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of injuries he thereby received: this was holden to be murder. (1 *Hale*, 454.) So, in all other cases, where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, it is murder. (4 *Bl. Com.* 199; and see *R. v. Tranter et al.*; 1 *Str.* 499; *Fost.* 293.)

And it may safely be laid down as a general rule, that no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; but if effected with a blow of a fist, or of a stick, or other weapon not likely to kill, it is manslaughter only. As, where a man, being grossly insulted by a woman, threw a broomstaff at her from a distance, and killed her (1 *Hale*, 455), and see other cases. (*Hazel's case*, 1 *Leach*, 368; *Turner's case*, 1 *Ld. Raym.* 143; *Wigg's case*, 1 *Leach*, 378.) But where the instrument used is so improper as manifestly to endanger life, the intention of the party to kill will be implied from that circumstance. (*Rex v. Howlett*, 7 *C. & P.* 274; *Macklin's case*, 2 *Lew.* 225.)

It is a general rule that, where persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance. (1 *Russ. on Crimes*.) But three things are to be attended to in matters of this kind: the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed; or if a private person interfere and act in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted or killed; the killing will be manslaughter only. (*Welsly's Arch. Cr. Law*, 15th ed. 551.)

Resisting officers
and others.

In all of these cases the officer or private person has placed himself beyond the protection of the law, and the attempt to arrest is looked upon, as in ordinary cases, as such a provocation as to reduce the offence of killing to manslaughter. For various cases concerning the authority of officers and others, see 1 *Russ. on Crimes*, and *Welsly Arch. Cr. Law*, 15th ed., 451.

In all of these cases the officer or private person has placed himself beyond the protection of the law, and the attempt to arrest is looked upon, as in ordinary cases, as such a provocation as to reduce the offence of killing to manslaughter. (See 1 *Russ. on Crimes*, and *post*, p. 1330.)

Manslaughter has been already defined as an unlawful killing without malice—either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act; for when the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention of injuring him who was the victim of his conduct. (*Per Erle, J.*, in *Reg. v. Bruce*, 2 *C. C. C.* 262.) Of this latter class are the following cases:—

Unlawful or
wanton acts.

If A. shoot at the poultry of B., wantonly, and without any felonious

3. *Manslaughter.*

intent, and accidentally kill a man, the offence will be manslaughter. (1 *Hale*, 475.)

So, if a man shoot at deer in another's park, without leave, though done in sport, and a bystander be killed, such killing is manslaughter. (1*b*.)

Where a man was in possession, under the sheriff, and one of the prisoners, of whose goods he was in possession, assisted by the other prisoner, plied the man with liquor, themselves drinking freely also, and when he was very drunk, put him into a cab, and caused him to be driven about the streets; and about two hours after he had been put into the cab he was found dead. It was held, that if the prisoners, deceased being drunk, put him into the cab, and drove him about, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. (*Reg. v. Packard*, 1 *C. & M.* 236.)

Prize-fighting,
amicable contest.

A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing and sword-playing, the succeeding amusements of their posterity (see *R. v. Perkins*, 4 *C. & P.* 537; *R. v. Hargrave*, 5 *C. & P.* 170; *R. v. Murphy*, 6 *C. & P.* 103); therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter (4 *Bl. Com.* 183). But, it is said, that if the king command or permit such diversion, the act being in that case lawful, the killing would be misadventure only. (*Fost.* 259; *sed vide Hale*, 472.) But all struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. (*Reg. v. Canniff*, 9 *C. & P.* 359.) And all persons present, assisting by their presence, at a prize fight, are guilty of manslaughter, if one of the combatants be killed. (*Ree v. Murphy*, 6 *C. & P.* 103.)

Wanton and heed-
less acts.

By unlawful acts must be understood also all wanton and mischievous acts which the party who commits them can neither justify nor excuse, as well as acts heedlessly and incautiously done, from which death results, though unaccompanied by any intent to do injury; but if such heedless and incautious acts are not in themselves unlawful, then if death result therefrom, it is not manslaughter, but merely an accident; thus in *Reg. v. Bruce*, 2 *C. C. C.* 262, a prisoner who came into a shop and pulled a lad by the hair from off his seat, and spun him round, but the lad broke away from him, whereby the prisoner, being intoxicated, fell against the deceased, knocked her down, and caused her death, was held entitled to an acquittal, it appearing that the lad treated the affair as a joke, and did not resist the prisoner throughout.

Thus, if a person, breaking a horse, ride him amongst a crowd and death ensue from the viciousness of the animal, and it appear to have been heedlessly done and not with intent to do mischief, it is manslaughter. (1 *East P. C.* c. 5, s. 18.)

So if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house and a person be thereby killed. (1 *Hale*, 475.)

So if workmen throwing stones and rubbish from a house, do not take due precaution by looking out or giving warning, and any one be killed, it is manslaughter. (*Ante*, p. 1316.)

But in all these cases if a general malignity of heart is observable, and an intention to do mischief, be it to whomsoever it may, the killing will be murder. (1 *Hawk. P. C.* c. 31, s. 68.)

Two persons were riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him and both fell, the deceased being killed by the concussion: *Patteson*, J., directed an acquittal of the first who passed; and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding he ran against the deceased, but to acquit him if they thought that the deceased's horse was unruly, and

ran against the horse of the prisoner. (*R. v. Mastin*, 6 C. & P. 396.)

If the driver of a carriage race with another carriage, and urge his horses to so rapid a pace that he cannot control them, it is manslaughter, if in consequence the carriage upset and a passenger be killed. (*R. v. Timmins*, 7 C. & P. 499.)

A lad out of frolic took the trap-stick out of the front part of a cart, in consequence of which it upset, and the carman, who was loading sacks therein, was killed; and this was held to be manslaughter. (*R. v. Sullivan*, 7 C. & P. 641.)

So where the prisoners had thrown stones down a mine by which the scaffolding was broke, and in consequence a corf in which deceased was descending was upset, and he was killed; this was manslaughter. (*Fenton's case*, 1 Lewin, 179.)

A cannon, returned to an ironfounder burst, was sent back by him in so imperfect a state, that, on being fired, it burst again and killed a person, and it was held to be manslaughter. (*R. v. Carr*, 8 C. & P. 163.)

If several persons meet together for the purpose of prosecuting some unlawful design, and in furtherance of that design a man be killed, the guilt of the killing will attach to all present, whether it be murder or manslaughter. Where several join to do an unlawful act.

Thus if a body of persons, resolving to resist all opposers in the commission of any breach of the peace, happen to kill any one in the prosecution of this unlawful purpose, they will be guilty of murder. (*Fost.* 261; 1 *Russ. on Crimes*, 856.) The act, however, must be in furtherance of the common intent; for, if several were to intend and agree together only to frighten a constable and one were to shoot him through the head, such an act would affect the individual only by whom it was done. (*Macklin's case*, 2 Lew. 225.)

And even an act lawful in itself may be performed in a manner so criminal and improper as to make the party performing it and causing the death of a person guilty of manslaughter, and, according to the circumstances, of murder. (1 *Russ. on Crimes*, 857.)

As if a medical man, though lawfully qualified to practise as such, cause the death of a person by the grossly unskilful, or the grossly incautious use of a dangerous instrument, he is guilty of manslaughter. Improper medical treatment.
(*Reg. v. Spilling*, 2 M. & Rob. 107.)

Where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. (See *R. v. Long*, 4 C. & P. 423; *R. v. Senior*, R. & M. C. C. 346, ante, p. 1318.) In *R. v. Webb* (1 M. & Rob. 410), Lord Lyndhurst laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without a licence. In either case, if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *R. v. Williamson*. I shall leave it to the jury to say—first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence."

3. *Manslaughter.*

In the case of *R. v. Nancy Simpson*, (reported in *Wilcock on the Laws relating to the Medical Profession*, Append. 227,) the prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool Infirmary as cured after undergoing salivation, and that he was recommended by another patient to go to the prisoner for an emetic to get the mercury out of his bones. The prisoner was an old woman, who resided at Liverpool, and occasionally dealt in medicines; she gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death; and she said she had received the mixture from a person who came from Ireland, and had gone back again. And in that case Mr. Justice Bayley said, "I take it to be quite clear that if a person not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequence in a case where medical assistance may be obtained. If he does so, it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another." The prisoner was convicted.

If a chemist's apprentice be guilty of negligence in delivering medicine and death ensue in consequence, he is guilty of manslaughter. (*Tessymond's case*, 1 *Lew.* 169.)

Neglect of natural duties.

Lastly, there are certain natural and moral duties towards others, which if a person neglect without malicious intention, and death ensue, he will be guilty of manslaughter. Of this nature is the duty of a parent to supply a child with proper food.

Children.

When a child is very young, and not weaned, the mother is criminally responsible if the death arose from her not suckling it when she was capable of doing so. (*R. v. Edwards*, 8 *C. & P.* 611.) But if the child be older, the omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child after the husband has provided it (*R. v. Saunders*, 7 *C. & P.* 277.)

Bastards.

Since the 4 & 5 Will. 4, c. 76, if a bastard died through the omission to supply it with food, the omission is the omission of the man who has married the mother. (*Ib.*; *Russ. on Cr.* 491.)

Apprentices and servants.

A master is not bound by the common law to find medical advice for a servant; but the case is different with respect to an apprentice, for a master is bound during the illness of his apprentice to find him with proper medicines, and if he die for want of them, it is manslaughter in the master. (*R. v. Smith*, 8 *C. & P.* 153.) And this is the case, even though he be bound by an invalid deed of apprenticeship. (*R. v. Davies*, per *Patteson, J.*, *Hereford Sum. Ass.*, 1831.)

Infirm persons.

Where a person undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing it for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible. On an indictment for the murder of an aged and infirm woman by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. (*R. v. Marriott*, 8 *Car. & P.* 425.)

Accessaries.

There can be no accessaries to this offence before the fact, because it must be done without premeditation. (1 *Hawk.* c. 30, s. 2; 1 *East's P. C.* 218. See "*Accessory*.") But there may be accessaries after the fact. (3 *Inst.* 55.) And if A. be indicted for murder, and C. for

harbouring and assisting A., well-knowing that he had committed the murder, and the offence of A. be reduced to manslaughter, C. may notwithstanding be found guilty as accessory after the fact. (*Reg. v. Greenacre*, 8 Car. & P. 35.)

4. Murder.

The evidence is the same as in murder, with this exception, that, in murder, the prosecutor need only prove the homicide, without going into evidence of the circumstances under which it was committed; in manslaughter, he must give evidence of all the facts of the case, so as to prove the homicide to be manslaughter. Evidence, &c.

If, on the trial of an indictment for murder, the prisoner appear to the jury to be guilty of manslaughter, they may find him so guilty. Trial of. (2 Hale, 302.)

The offence is not triable at any quarter sessions.

As to the trial, &c., of manslaughter abroad, &c., see *post*, p. 1333.

By 24 & 25 Vict., c. 100, s. 5, every person convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than 3 years, or to be imprisoned, with or without hard labour, for any term not exceeding 3 years, or to pay such fine as the court shall award. See further, Punishment. tits. "*Hard Labour*," "*Imprisonment*."

As to the punishment of accessories after the fact, see the 3rd section of the 24 & 25 Vict. c. 94, tit. "*Accessories*."

IV. Murder.

Herein—

Division of subject.

1. *Of the Offence itself*, p. 1327.
2. *The Indictment*, p. 1332.
3. *The Evidence*, p. 1332.
4. *The Place of Trial*, p. 1333.
5. *The Punishment, Sentence, Execution, and Treatment of Murderers*, p. 1339.
6. *The Escape of Murderers*, p. 1339.

1. THE OFFENCE OF MURDER.

Murder is, when a man of sound memory, and of the age of discretion, unlawfully killeth any person under the Queen's peace, with malice aforethought, either expressed by the party, or implied by law, so that the party wounded or hurt die of the wound or hurt, within a year and a day. (3 Inst. 47.) Murder, what is.

The Offender must be of sound Memory, &c.—Murder, therefore, cannot be committed by an idiot, lunatic, or infant, unless indeed he show a consciousness of doing wrong, and of course a discretion, or discernment between good and evil. (4 Bl. Com. 195; 1 Hawk. c. 1.) —But if any person procure an idiot, &c., to murder another, the procurer is guilty of the murder. (1 Hawk. c. 31, s. 7.) Or if he aid and abet him knowing that he entertains mischievous designs. (*Reg. v. Tyler*, 8 C. & P. 616.) See *ante*, "*Children*" and "*Lunatics*." Offender must be of sound memory, &c.

Must be by an unlawful Killing, not excusable or justifiable.—Taking away a man's life by perjury is not, it seems, in law, murder (see *R. v. Macdaniel & al.*, Fost. 132; and see 4 Bl. Com. 196, n.); although, *in foro conscientie*, it is as much so as killing with a sword. The killing must be unlawful, &c.

If a man, however, do any other act, of which the probable consequence may be, and eventually is, death, such killing may be murder, although no stroke were struck by himself: as was the case of the un-

4. Murder.

natural son who exposed his sick father to the air, against his will, by reason whereof he died (1 *Hawk.* c. 31, s. 5); and of the harlot, who laid her child in an orchard, where a kite struck it and killed it. (1 *Hale*, 432.) So, if a child be left in an unfrequented place, where it is not likely to be found. (*R. v. Walters*, 1 *Russ. on Crimes.*) So, where an apprentice died from harsh treatment, and want of care upon the part of his master, whilst he was labouring under disease; this was holden to be murder in the master. (*R. v. Squire & ux.*, 1 *Russ.*; and see *ante*, p. 1326; and *R. v. Marriott*, 8 *C. & P.* 425: *ante*, p. 1326.) And forcing a person to do an act which is likely to produce death, and which does produce it, is murder; and threats or well-grounded fears inspired may constitute such force; as, if a person being attacked should, from an apprehension of immediate violence—an apprehension which must be well-grounded and justified by the circumstances—throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder. (*R. v. Pitts*, 1 *C. & M.* 284.)

But if a man, by harsh and unkind usage, put another into such a passion of grief or fear, that the party either die suddenly, or contract some disease whereof he dies, though this may be murder or manslaughter in the sight of God, yet, in a human judicature, it cannot come under the judgment of felony, because no external act of violence was offered whereof the law can take notice. (1 *East's P. C.* 225.)

If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad, and it kill a man, this, it seems, is manslaughter in the owner; but if he had purposely turned it loose, though barely to frighten people, and to make what is called sport, it is as much murder as if he had incited a dog or a bear to worry them. (1 *Hale*, 431; 3 *C. & P.* 320.) And see further as to keeping, &c., mischievous animals, tit. “*Dogs.*”

He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (1 *Hawk.* c. 27, s. 6; *Sawyer's case*, *O. B.* 1815, *S. P. MS.*)

If 2 persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. (*R. v. Alison*, 8 *C. & P.* 418.)

It seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessory to the murder. (1 *Hawk.* c. 31, 17; and see *ante*, “*Accessory.*”)

We have already noticed as to what homicide is justifiable or excusable, *ante*, p. 1313 to p. 1316.

The death to constitute murder must take place within a year and a day after the stroke or other cause of it, *ante*, p. 1327.

Person killed must be a reasonable being, under the Queen's peace.

The person killed must be a reasonable Creature, in being, and in the Queen's peace.—Therefore to kill a child in its mother's womb, is no murder: but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it is murder in the person who administered or gave them. (3 *Inst.* 50; 1 *Hawk.* c. 31, s. 16. As to abortion, &c. see *ante*, “*Abortion.*”) As to when a child is sufficiently produced into the world to make the killing of it murder, see 1 *Russ. on Crimes*, 670, 4th ed. *Reg. v. Senior, R. & M.* 341, and *West*, 2 *C. & K.* 784.)

The words “the Queen's peace,” in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war. (3 *Inst.* 50; 1 *Hale*, 433.) But killing even an alien enemy within the

kingdom, unless in the actual exercise of war, would be murder. (1 *Hale*, 433.) 4. Murder.

It is a good general rule, that no person should be found guilty of murder, unless the body of the deceased is found; but this rule must be taken rather as a caution than as a maxim never to be departed from. (2 *Hale*, 290; 3 *Chit. C. L.* 738.) A woman who has not concealed the birth of her child cannot be called upon either to account for it, or to say where it is, unless there be evidence to show that her child is actually dead. (*R. v. Hopkins*, 8 *C. & P.* 592.) Body not found.

As to murders committed abroad, see the 24 & 25 Vict. c. 100, s. 9, *post*, p. 1333.

The Killing must be committed with Malice aforethought.—Wherever it appears that a man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, or the like. (1 *Hawk.* c. 31, s. 32; *R. v. Greenacre*, 8 *C. & P.* 35.) Mere killing is *prima facie* evidence of malice.

By malice expressed is meant a deliberate intention of doing any bodily harm to another, whereunto by law a person is not authorised. (1 *Hale*, 451.) Malice expressed.

And the evidences of such a malice must arise from external circumstances discovering that inward intention; as, lying in wait, antecedent menacings, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances. (1 *Hale's Sum.* 51.)

Malice implied in several cases: as when one voluntarily kills another without any provocation: for in this case the law presumes it to be malicious, and that he is a public enemy of mankind. (1 *Hale*, 455, 456.) Malice implied.

Poisoning also implies malice, because it is an act of deliberation. (1 *Hale*, 456.)

Also, where a prisoner dies by duress of the gaoler, the law implies malice, by reason of the cruelty. (3 *Inst.* 52.)

And in general, any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is judged to be of malice *prepense*, and, consequently, murder. (2 *Hawk.* c. 31, s. 18; 2 *Str.* 766.) Malice prepense.

For when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word malice is apt to lead one, *a principle of malevolence to particulars*; for the law by the term *malice (malitia)* in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked heart, regardless of social duty, and bent upon mischief. (*Post.* 256, 257.) Malice aforethought.

Also, wherever a person in cool blood, by way of revenge, beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. (1 *Hawk.* c. 31, s. 38.)

Where a master or person in authority, in *foro domestico*, exceeds the bounds of moderation in administering correction, and death ensues, it will be manslaughter or murder according to the circumstances. Improper correction.

A blacksmith struck his servant with a bar of iron by way of correction for improper behaviour, by which he was killed: held, murder. A woman kicked and stamped on the belly of her child: ruled the same. (*Grey's case*, *Kel.* 64, 65; 1 *East's P. C.* 261.) Where a master corrected his servant with an iron bar, and a school-master stamped on his scholar's belly, so that each of the sufferers died; these were justly holden to be murders; because the correc-

4. *Murder.* tion being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. (*Id.*; *Post.* 262.)
- Universal malice. If a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not, for its universal malice. 4 *Bl. Com.* 400.)
- Poison. In all cases where a man wilfully administers poison to another, (1 *Hale*, 455), or lays poison for him, and either he or another takes it, and is killed by it (*Id.* 466), the law implies malice, although no particular enmity can be proved. (4 *Com.* 34.)
- Giving a potion to cause abortion. If a woman be with child, and any give her a potion to destroy the child within her, and it kills her, this is murder. (1 *Hale*, 430. See "*Abortion.*")
- Killing in prosecution of felony. As to killing by improper medical treatment, see *ante*, p. 1325. It is a general principle that, if in the execution of or attempt to execute a felony a man kill another, he will be guilty of murder. Thus if C. having malice against A. strikes at and misses him, but kills B., this is murder in C.: or if A. feloniously shoot at the poultry of another and kill a man, this will be murder. (*Post.* 258.)
- Provocation. It has been seen (*ante*, p. 1319), in what cases the killing of a man will be reduced to manslaughter by provocation. The provocation, however, must be adequate—must neither be sought nor taken advantage of to gratify a preconceived enmity—and must immediately precede the fatal blow (1 *Russ. on Crimes*); if the blood have time to cool between the provocation and the killing, it will be murder. (*R. v. Hayward*, 6 C. & P. 157; *R. v. Lynch*, 5 C. & P. 324.)
- Duelling. Therefore, if 2 persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder (1 *Hale*, 442, 452; 1 *Hawk.* c. 31, s. 31; see *R. v. Oneby*, 2 *Str.* 766), no matter how grievous the provocation, or by which party it was given. (3 *East*, 581.) The second of the deceased, also, is deemed guilty of murder, as being present, aiding and abetting; and although Lord *Hale* seems to think the rule of law, as to principals in the second degree, too far strained in that case (1 *Hale*, 442, 452), yet in (*Reg. v. Young*, 8 C. & P. 644) it was laid down that not only are the seconds guilty, but that others who are present, if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are assisting and encouraging by their presence at the moment when the fatal shot is fired, they are in law guilty of murder.
- Killing officers of justice and others. If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, &c., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 *Hale*, 462), or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes; the law will imply malice, and the offender will be guilty of murder. (1 *Hale*, 456, 457, 460; *Post.* 270, 308.)
- Authority of officers. But to entitle an officer to the protection of the law, his authority must be legal: if the warrant were illegal and void upon the face of it (see 1 *Hale*, 459; 1 *East*, P. C. 310); or issued with a blank in it, and the blank afterwards filled up (*R. v. Stockley*, 1 *East*, P. C. 310; *R. v. Hood*, 1 *Mood. C. C.* 281), or issued with an insufficient description of the defendant, as for instance, if it were to take the son of J. S. L. (*Id.*), or if it be attempted to be executed against C. instead of B., the killing would be manslaughter only. Where a justice's warrant of commitment was directed "to the constable of Gainsborough," a parish in the county of Lincoln, the court held that such warrant must be read as directed to the parish constable of Gainsborough, there being such an officer who must execute it, and its execution by a county policeman was illegal. Therefore, a conviction for wounding

a county policeman in the execution of such a warrant with intent to resist the prisoner's lawful apprehension thereunder, was quashed. (*R. v. Saunders*, 36 *L. J. M. C.* 87; 1 *L. R. C. C. R.* 75; 1 *Hale*, 457.) If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him; if the party attempting the arrest were a constable, the killing is murder (1 *Hawk. c.* 28, s. 12; 2 *Hale*, 84, 87, 91); if a private person, manslaughter (see 2 *Hale*, 83, 92); because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where a person is arrested or attempted to be arrested upon a reasonable suspicion of felony. (See *Samuel v. Payne*, *Doug.* 359.) An officer is justified in arresting on a charge of felony, though the charge does not in terms specify all the particulars necessary to constitute the felony. (*R. v. Ford*, *R. & R.* 329.) But where a constable attempted to arrest a man while in a privy, without any charge having been made against him, but upon a simple direction to take him, whereupon the man immediately stabbed the constable; it was holden by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only. (*R. v. Thompson*, *R. & M.* 80.) A police officer found N. with potatoes under his shirt, which had been recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so; and a rescue being attempted, O. was struck by A., who went away, and O. was afterwards killed by other persons, who attempted the rescue:—Held by the judges that the police officer had no right to apprehend N., and that the killing of O., therefore, did not amount to murder, and that, on an indictment for murder, A. could not be convicted of an assault. (*Reg. v. Phelps*, 1 *Car. & M.* 180.) If a constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it; and, therefore, the attempt to retake the prisoner was illegal also. (*R. v. Curvan*, *R. & M.* 132.) But if a constable having a charge of felony against a defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even though the constable do not tell him of the charge, and the defendant in fact has done nothing for which he is liable to be arrested. (*R. v. Woolmer*, *R. & M. C. C.* 334.)

“There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities.” (Per Lord *Tenterden*, *C. J.*, *Beckwith v. Philby*, 6 *B. & C.* 638; and see *ante*, “Constable.”)

But a private person may arrest another whom he sees attempting to commit a felony, and if he be killed in the attempt, it will be murder. (2 *Hawk. c.* 12, s. 19.)

If a seaman be impressed, and the pressgang be resisted, and any of them be killed; if the pressgang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise but manslaughter. (*R. v. Broadfoot*, *Fost.* 154.)

A special constable duly appointed under the stat. 1 & 2 Will. 4, Special constable. c. 41, retains all the authority of a constable at common law, until his

4. *Murder.* services are suspended or determined under the 9th section of that statute. (*Reg. v. Porter*, 9 C. & P. 778.)
- Gamekeepers. As to how far gamekeepers and others may apprehend poachers, see *ante*, "Game," p. 777.
- Notice on process. When any officer is in the legal execution of his duty, or a private person endeavouring to suppress an affray, or apprehend a felon and is resisted and killed; if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances (*R. v. Howarth*, 1 Mood. C. C. 207), the killing is murder; if it appear that he was ignorant in this respect, it is manslaughter only. (5 *Hawk.* c. 31, ss. 49, 50; *Fost.* 310.)
- If a constable command the peace (1 *Hale*, 461), or show his staff of office (*Fost.* 311), this, it seems, is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment: proof that he was accustomed to act as constable is sufficient. (1 *East*, P. C. 315.) But private persons, when they interfere, must expressly intimate their intention, otherwise killing them will be manslaughter only. (*Fost.* 310, 311.)
- In all cases where the outer door of a dwelling-house may be broken open in order to execute process, there must be a demand of admittance, or something equivalent thereto, and a refusal (*Fost.* 320, 136; see *Hancock v. Brown*, 2 B. & Ald. 592), otherwise, if the officer be killed, it will be manslaughter only. (*Arch. Cr. Law*, by Welsby, 15th ed. 555.)
- In the cases above stated to be manslaughter only, if there be evidence of express malice in the party killing, the homicide will be murder. (*R. v. Stockley*, 1 *East*, P. C. 310; *R. v. Curtis*, *Fost.* 135.)

2. INDICTMENT FOR MURDER (a).

- Indictment for murder. *Venue.*—As to the venue in general, see *post*, title "Indictment," as to the venue, where the murder takes place abroad, &c. *post*, p. 1333.
- Name of deceased. *Deceased's Name.*—As to this, see *post*, title "Indictment," (Names in).
- Mode in which the murder is committed. *Statement of the Offence.*—A mere statement that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased is sufficient, 24 & 25 Vict. c. 100, s. 6.

3. THE EVIDENCE IN MURDER.

- Evidence. The requisite evidence both for and against the prosecution may be collected from the preceding observations, as to what will constitute murder or not, *ante*, p. 1327; and also what averments in the indictment must be strictly proved.
- It has been already observed, *ante*, p. 1329, that the prosecutor is not bound to prove that the homicide was committed from *malice prepense*, if he prove homicide merely, the law presumes malice, and calls on the defendant to rebut it, by proving, either from the cross-examination of the prosecutor's witnesses, or from witnesses on his behalf, that the homicide was justifiable, or excusable, or that at most it amounted to manslaughter only, and not to murder. (*Rex v. Greenacre*, 8 C. & P. 4.) If, however, there be direct evidence of malice prepense, the prosecutor had better prove it.
- A. was indicted for the murder of H.—It was opened that A., having malice against P., hired H. to murder him, and that H. did so; but that H. being detected, A. had murdered H. to prevent a discovery of

(a) By the 14 & 15 Vict. c. 100, s. 4, re-enacted by 24 & 25 Vict. c. 100, s. 6, the old law upon the subject of indictments for murder was rendered obsolete, and since then indictments for murder and manslaughter have simply charged the

defendant with the murder or the killing of the deceased; the authorities upon the statement of the offence, the description of the wound, &c., are therefore omitted in this edition.

his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P., and it was held, that the prosecutor might also give evidence to show that H. was, in fact, the person by whom P. had been murdered. (*R. v. Cleves*, 4 C. & P. 221.)

As to the evidence by the dying declarations of the deceased, see tit. "Evidence."

4. Murder.

4. PLACE OF TRIAL FOR MURDER.

By 24 & 25 Vict. c. 100, s. 9, where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offence committed by any subject of her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this act. This section is framed upon 9 Geo. 4, c. 31, s. 7, upon which section it was decided that it did not extend to offences committed by foreigners upon English subjects and upon English vessels. (*Reg. v. Lewis*, D. & B. 182.)

British subjects may be tried in the United Kingdom, for murder or manslaughter committed abroad.

A bill of indictment for such offence, it seems, ought not to state it to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary Le Bow," &c.; and it being so stated, the court directed the London venue to be struck out before the bill was found by the grand jury. (*R. v. Helsham*, 4 C. & P. 394, coram Bayley, J.)

See the case of *R. v. Sawyer*, as to the trial for murder abroad, (*R. & R.* 294); and the judgment more fully reported in *Carr. C. L.* 103-4.

By 24 & 25 Vict. c. 100, s. 10, where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland; or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of England or Ireland; every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder, or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place.

24 & 25 Vict. c. 100. Trial for murder and manslaughter, where death or cause of death happens in England, or at sea.

As to the trials for murder and other felonies committed on the boundaries of counties, or partly in one county and partly in another, &c., see tit. "Indictment," (*Venue*).

Boundaries of counties, &c.

By stat. 22 Geo. 2, c. 33, art. 28, all murders committed by any person in the fleet shall be punished with death, by the sentence of a court martial.

In the fleet.

By the 25 & 26 Vict. c. 65, an act for the more speedy trial of certain homicides committed by persons subject to the Mutiny Act, it is enacted:

25 & 26 Vict. c. 65.

Sect. 1. Whenever any person shall have been committed for any murder or manslaughter committed or supposed to have been committed at any place in England or Wales, and out of the jurisdiction of the Central Criminal Court, or at any place in Ireland other than the county of the city of Dublin or the county of Dublin, and it shall

The Queen's Bench or a judge may order certain prisoners to be indicted and tried under the provisions of this act.

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25 & 26 Vict. c. 65.

appear to her Majesty's Court of Queen's Bench in that part of the United Kingdom wherein the said offence was committed or supposed to have been committed, in term time, or to any judge thereof, or of any of her Majesty's superior courts of common law in the same part of the United Kingdom, in vacation, that the said person (hereinafter called the prisoner) was at the time of the commission or supposed commission of the said murder or manslaughter subject to the present or any future Mutiny Act, and that the person (hereinafter called the deceased) for the murder or manslaughter of whom the prisoner shall have been committed was at the time last aforesaid subject to the said act or acts, it shall be lawful for such Court of Queen's Bench in term time, or for such judge in vacation, without the prisoner being brought or appearing in person before the said court or judge, upon the application of her Majesty's principal secretary of state for the war department, and upon his certificate in writing, in the form numbered 1, in the schedule to this act annexed, or to the like effect, duly signed, that it would contribute to the maintenance of good order and military discipline if the said prisoner were to be indicted and tried under the provisions of this act, to order that the said prisoner shall be indicted and tried under the provisions of this act, and such order may be in one of the forms numbered 2 in the schedule to this act annexed, or to the like effect.

And upon such order the prisoner shall be removed to the gaol of Newgate in London or the Richmond Bridewell in Dublin, and the depositions, &c., returned to the court at which the prisoner is to be indicted.

Sect. 2. Whenever any such order shall have been made, the gaoler or keeper of any gaol or house of correction in which the said prisoner shall be confined shall forthwith upon the delivery to him of an office copy of such order, without writ of habeas corpus or other writ for that purpose, cause such prisoner, with his commitment and detainer, to be safely removed to her Majesty's gaol of Newgate in the city of London if the said prisoner shall be confined in England or Wales, and to her Majesty's gaol called the Richmond Bridewell in the county of the city of Dublin if the said prisoner shall be confined in Ireland, and thereupon the keeper of such gaol shall receive such prisoner into his custody in such gaol, there to remain until he shall be delivered by due course of law; and the justice or coroner by whom the prisoner was committed, or any other person having the custody or possession thereof, shall forthwith upon the delivery to him of an office copy of such order transmit any recognizances, depositions, examinations, or informations relating to the murder or manslaughter mentioned in such order which shall be in his custody or possession to the proper officer of the court at and before which the prisoner shall be rendered liable to be indicted under the provisions of this act, to be by him kept among the records of the court.

A prisoner removed may be indicted and tried in London or Dublin.

Sect. 3. Whenever any prisoner shall have been removed to the said gaol of Newgate in the city of London under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed within the jurisdiction of the Central Criminal Court; and whenever any prisoner shall have been removed to the Richmond Bridewell in the county of the city of Dublin under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed in the county of the city of Dublin.

A certificate of his removal under this act and of the cause of his committal shall be

Sect. 4. Whenever any prisoner so removed to one of the said gaols shall be indicted under the provisions of this act, an office copy of the before-mentioned order of the Court of Queen's Bench, or of a judge, shall be delivered to the proper officer of the court at and before

which the prisoner shall be rendered liable to be indicted under the provisions of this act, and such officer shall thereupon, by indorsement on the back of the bill of indictment, before its presentment by the grand jury, or by direction of the justices, judges, or commissioners of the court before whom such indictment shall be tried, or any two or more of them, at any other time, certify that the prisoner was committed for the murder or manslaughter of the deceased, and was removed to the gaol of Newgate, or the Richmond Bridewell, as the case may be, under the provisions of this act; and such indorsement, which may be in the form numbered 3 in the schedule to this act annexed, or to the like effect, and which may be amended by the said last-mentioned justices, judges, or commissioners, or any two or more of them, at any time, and in such manner, and as often as to them shall seem fit, shall be conclusive proof that the said prisoner was committed for the murder or manslaughter of the deceased, and was removed to the said gaol of Newgate or the said Richmond Bridewell under the provisions of this act; and such indorsement shall not constitute or be deemed or taken to be a portion of the indictment.

Sect. 5. Whenever any indictment found under the provisions of this act shall be amended in any manner, the before-mentioned indorsement thereon shall, if it be necessary, be amended in the like manner.

Sect. 6. A prisoner committed for murder may be indicted under the provisions of this act for manslaughter, and a prisoner committed for manslaughter may be indicted under the same provisions for murder.

Sect. 7. It shall not be lawful for any person, either by himself or his counsel, to take any objection, either in the court at, before, or by which the prisoner shall be indicted, arraigned, tried, convicted, or sentenced under the provisions of this act, or in any court of error, to any order of the said Court of Queen's Bench or of any judge, or to any other proceeding under or by virtue of which the prisoner shall have been removed to the gaol of Newgate or the Richmond Bridewell; and the form of the indictment under the provisions of this act shall be the same as that of indictments for murder or manslaughter committed within the jurisdiction of the court at and before which such prisoner shall be indicted under the provisions of this act; and it shall not be necessary to prove on the trial of the prisoner that either the prisoner or the deceased was or were at the time of the commission or supposed commission of the said murder or manslaughter subject to the provisions of any Mutiny Act; and the prisoner shall not be acquitted by reason only of its appearing that the prisoner or the deceased was not or were not at the time last aforesaid subject to the provisions of any Mutiny Act.

Sect. 8. When any person shall have been convicted of any offence upon the trial of any indictment found under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the court before which any such conviction shall have taken place, or for any two or more of them, or, in case sentence shall not then be passed, for the justices, judges, or commissioners of the said court, or for any two or more of them, at any subsequent sessions of the said court, to order and adjudge such convict to be punished according to law at any place either within the jurisdiction of the said court, or within the county or place where such offence shall have been committed or supposed to have been committed; and in cases where such justices, judges, or commissioners, or any two or more of them, shall order such convict to be punished in such county or place, it shall be lawful for such justices, judges, or commissioners, or any two or more of them, after passing sentence upon such convict, to make an order commanding the keeper of the gaol of Newgate or of the Richmond Bridewell to cause such convict to be delivered into the custody of the gaoler or keeper

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25 & 26 Vict. c. 65.
indorsed on the
indictment.

When indictment
is amended the
indorsement is to
be also amended.

Indictment need
not follow the
commitment.

No objection to be
taken to any order,
and no proof to be
required of the
subjection of any
person to the
Mutiny Act.

Any person convicted
may be
sentenced to be
punished either in
the county where
the offence was
committed or
within the juris-
diction of the
court by which he
shall be tried.

4. *Murder.*

25 & 26 Vict. c. 65.

of the gaol or house of correction in such county or place, together with such order, and commanding such gaoler or keeper to receive such convict into his custody in such gaol or house of correction, and him there safely to keep until such sentence shall have been executed upon such convict according to law, or until he shall be otherwise delivered by due course of law, and also to make an order commanding the sheriff of such county or place to execute such sentence upon such convict within such county or place according to law in the same manner as if he had been tried and received such sentence in such county or place; and every such sheriff, gaoler, and keeper respectively is hereby commanded to perform and execute according to law each and everything which he shall be commanded to perform and execute by any such order; and the several forms in the schedule to the 19 Vict. c. 16, an act to empower the Court of Queen's Bench to order certain offenders to be tried at the Central Criminal Court, contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law, and in the case of any order directed to any sheriff, and commanding him to execute any sentence, it shall be sufficient to deliver such order either to such sheriff or to his under sheriff.

On notice given by prosecutor, recognizances to bind parties to give evidence at the inquiry and trial.

Sect. 9. Every recognizance which shall have been entered into for the prosecution of the prisoner, and every recognizance of any witness to give evidence against him for his said offence, shall, in case any such order shall be made as is mentioned in the first section of this act, be obligatory on each of the parties bound by such recognizance to prosecute and give evidence, and to do all other things mentioned with reference to the said inquiry and trial at the court at or before which the prisoner shall be indicted or tried under the provisions of this act, in like manner as if such recognizance had been originally entered into for prosecuting such offence, or giving evidence, or doing other things before the said last-mentioned court; provided that notice in writing shall have been given either personally, or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the said last-mentioned court upon the inquiry into and trial of the said offence; and the prosecutor is hereby required, on notice given to him that such order as is mentioned in the first section of this act has been made, to give such notice or notices in writing as are in this section mentioned.

Power to compel witnesses to attend trials.

Sect. 10. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to issue process to compel the attendance of witnesses, as well on the part of the prosecution as on the part of the defence, on the trial of such indictment, in like manner as in cases of indictments found at the said court for offences committed within the jurisdiction of the said court; and every such process shall and may be lawfully executed at any place in that part of the United Kingdom wherein the gaol to which the prisoner shall have been removed under the provisions of this act shall be situate.

Expenses of prosecution and rewards may be ordered to be paid.

Sect. 11. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made as to such court may seem reasonable and sufficient, to be paid forthwith by the proper officer of the said court, and such monies shall be repaid to the said officer by the same persons who would have been liable to pay the same, as if such court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which the prisoner was committed.

Power to order payment of expenses of prisoner's witnesses.

Sect. 12. Whenever any prisoner shall be tried at any court under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the said court before whom any such prisoner shall be tried, or for any two or more of them, if it shall seem reasonable so

to do, to order the payment of the expenses of the witnesses on the part of the defence, and such payment shall be made accordingly in the same manner in all respects as if such witnesses were witnesses on the part of the prosecution; and the commissioners of her Majesty's treasury shall, upon receipt of such last-mentioned order, and out of any monies provided by parliament for law charges in England or Ireland, as the case may be, repay such sum or sums as shall be therein specified to the person who shall have paid the same.

Sect. 13. Whenever any such order shall have been made as is mentioned in the first section of this act, it shall not be necessary for any purpose whatsoever to prove that the prisoner has been duly removed to the gaol of Newgate or the Richmond Bridewell under the provisions of this act, or that he was committed for the murder or manslaughter of the deceased; and no evidence or proof to the contrary shall be admitted: And every verdict and judgment which shall be given upon any indictment tried under the provisions of this act shall be deemed as good, valid, and sufficient in law as if the offence charged in such indictment had been actually committed within the jurisdiction of the said court before which such indictment shall be tried.

Sect. 14. Whenever any person shall have been removed into the custody of the said keeper of the said gaol of Newgate or of the Richmond Bridewell under the provisions of this act, such person shall, without writ of habeas corpus or other writ for that purpose, be removed into and from the court at or before which such indictment shall be found, tried, or proceeded upon, when, and as often as it may be necessary, by the keeper of the said gaol of Newgate or of the Richmond Bridewell, with his commitment and detainer, in order that he may be tried, sentenced, or otherwise dealt with according to law; and such removal shall not be deemed an escape.

Sect. 15. Whenever any indictment shall have been found under the provisions of this act, the justices, judges, or commissioners of the court at or before which such indictment shall be found, tried, or proceeded upon for the time being, or any two or more of them, shall possess the same power, jurisdiction and authority as to all matters and things whatsoever as if the offence charged in the said indictment had actually been committed within the jurisdiction of the said court; and every such offence may be dealt with, tried, and determined by and before such justices, judges, or commissioners, or any two or more of them, in the same manner in all respects as if the same had actually been committed within the jurisdiction of the said court: Provided that nothing in this section contained shall limit or lessen any power, jurisdiction, or authority conferred upon the said justices, judges, or commissioners, or any two or more of them, by this act.

Sect. 16. Sects. 21, 27, and 28 of 19 Vict. c. 16, extended to this act (a).

Sect. 17. Whenever any prosecutor and witnesses in any case where any indictment shall have been found under the provisions of this act shall appear before the court at or before which such indictment shall be found, tried, or proceeded upon, it shall be lawful for such court, from time to time and as often as to the same court shall seem fit, to require such prosecutor and witnesses to enter into such recognizance in such sum of money, and with such condition as to appearance at the said court, and otherwise, as to the said court shall seem fit.

Sect. 18. Her Majesty in council enabled to make rules for purposes of this act.

Sect. 19. Nothing in this act contained shall render any person claiming the privilege of peerage triable under the provisions of this act.

4. Murder.

25 & 26 Vict. c. 65.

No proof to be required of due removal of prisoner.

Verdicts and judgments to be valid.

The prisoner may be removed to and from the Central Criminal Court as often as necessary.

Court before which indictment found to have the same authority as if the offence had been committed within its jurisdiction.

Prosecutor and witnesses may be bound by recognizances to appear again before the said court.

Act not to affect any peer.

(a) See these sections under title "Trial."

4. *Murder.*

25 & 26 Vict. c. 65.
Interpretation of
terms.

Short title.

Sect. 20. In the construction of this act the words "present Mutiny Act" shall be understood to mean the act made and passed in this present parliament, intituled an act for punishing mutiny and desertion, and for the better payment of the army and their quarters; and the words "future Mutiny Act" shall be understood to mean any act hereafter to be made and passed for the purposes and with the intents and objects of the present Mutiny Act, or for the like purposes, and with the like intents and objects.

Sect. 21. In citing this act in any instrument, document, or proceeding it shall be sufficient to use the expression "the jurisdiction in Homicides Act, 1862."

SCHEDULE referred to in the foregoing Act.

1. *Form of Certificate mentioned in the First Section.*

I the undersigned, her Majesty's principal Secretary of State for the War Department, having been credibly informed that [*name or names of prisoner or prisoners*] lately committed for the murder [*or manslaughter*] of [*name of person killed*] deceased, and now confined in the gaol [*house of correction*] at _____ in the county of _____ is a person [*are persons*] subject to the Mutiny Act, and that the said [*name of person deceased*] deceased was at the time of the alleged murder [*or manslaughter*] also subject to the said act, and that the said murder or supposed murder [*or manslaughter or supposed manslaughter*] was committed in England or Wales, and out of the jurisdiction of the Central Criminal Court, [*or in Ireland and elsewhere than in the county of the City of Dublin, in the county of Dublin,*] and having been credibly informed of the circumstances relating to the said alleged crime, and deeming it expedient that a more speedy trial of the said [*name or names of prisoner or prisoners*] should be had than the usual course of practice allows, do hereby certify my belief that it would contribute to the maintenance of good order and military discipline if the said [*name or names of prisoner or prisoners*] were to be indicted and tried under the provisions of the jurisdiction in Homicides Act, 1862.

Given under my hand this

day of _____ A.D.
[*Signature of the said Secretary of State.*]

2. *Form of Order of the Court of Queen's Bench mentioned in the First Section.*

In her Majesty's Court of Queen's Bench. [*Name of Term*] Term, A.D. [*year of our Lord*].

WHEREAS it appears by the affidavit [*or affidavits*] of [*name or names of deponent or deponents*], that [*name or names of prisoner or prisoners*], now in the custody of the gaoler or keeper of the gaol [*or house of correction*] at _____ in the county of _____ was [*or were*] committed for the murder [*or manslaughter*] of [*name of deceased*] deceased, and that as well the said [*name or names of prisoner or prisoners*] as the said [*name of deceased*] deceased were at the time of the commission or supposed commission of the said murder [*or manslaughter*] subject to the Mutiny Act: Now thereupon, and on the application and certificate of her Majesty's principal Secretary of State for the War Department, it is ordered, that the said [*name or names of prisoner or prisoners*] be indicted and tried under the provisions of the jurisdiction in Homicides Act, 1862.

By the court.

3. *Form of Order of a Judge mentioned in the First Section.*

WHEREAS it appears [*follow the last preceding form as far as the words "Secretary of State for the War Department"*], I do order that the said [*name or names of prisoner or prisoners*] be indicted and tried under the provisions of the jurisdiction in Homicides Act, 1862. Given under my hand in vacation, this _____ day of _____ A.D. [*year of our Lord*].

[*Signature of judge.*]

4. *Form of Indorsement mentioned in the Fourth Section.*5. *Self-murder.*

I certify that [*name or names of prisoner or prisoners*] was [*or were*] committed for the murder [*or manslaughter*] of [*name of deceased*] deceased, and that he [*or they*] has [*or have*] been removed to the gaol of Newgate [*or the Richmond Bridewell*] under the provisions of the jurisdiction in Homicides Act, 1862.

25 & 26 Vict. c. 65.

[*Signature of proper officer of the court.*]

5. PUNISHMENT, SENTENCE, EXECUTION, AND TREATMENT OF MURDERERS.

By the 24 & 25 Vict. c. 100, s. 1, every person convicted of murder shall suffer death as a felon. Punishment.

And by 24 & 25 Vict. c. 94, s. 1, every accessory before the fact to any felony may be indicted, tried, convicted, and punished in all respects as a principal felon; so by sects. 4 and 5 of the same act, accessories after the fact may be imprisoned for any term not exceeding 2 years, with or without hard labour.

By 24 & 25 Vict. c. 100, s. 2, upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon. Sentence of death.

By the 24 & 25 Vict. c. 100, s. 3, the body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct.

By the 4 & 5 Will. 4, c. 26, s. 1, hanging in chains is abolished.

6. ESCAPE OF MURDERERS.

They that are present when any man is slain, and do not their best endeavour to apprehend the murderer or manslayer, shall be fined and imprisoned. (3 *Inst.* 53.) Persons present when murder is committed.

If a murder be committed in the day time in a town not inclosed, and the murderer escape, the township shall be amerced; but if inclosed, whether the murder be in the night or day, the town shall be amerced. (3 *Inst.* 53.) See further, "*Escape.*" Escape.

V. Self-Murder.

A *felo de se*, or felon of himself, is a person who, being of sound mind, and of the age of discretion, voluntarily killeth himself. (3 *Inst.* 54; 1 *Hale*, 411.) Felo de se.

If a man give himself a wound intending to be *felo de se*, and dieth not within a year and a day after the wound, he is not *felo de se*. (3 *Inst.* 54.) Year and day.

Mr. *Hawkins* speaks with some warmth against an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himself must be *non compos* of course; because it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. But he argues, that if this doctrine were allowable, it might be applied in excuse of many other crimes as well as this; as, for instance, that of a mother murdering her child, which is also against nature and reason; and this consideration, instead of being the highest aggravation of a crime, would make it no crime at all; for it is certain a person *non compos mentis* can be guilty of no crime. (1 *Hawk.* c. 27, s. 3; *R. v. Alison*, 8 C. & P. 418.) Non compos.

5. Self-murder. And Lord *Hale* says, it is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence but are under such infirmities; but it must be such an alienation of the mind, as renders a person to be madman, or frantic, or destitute of the use of reason, which will denominate him *non compos*. (1 *Hale*, 412.)

Accessory. If one encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. (*R. v. Dyson*, *R. & R. C. C.* 523; *R. v. Alison*, 8 *C. & P.* 418.)

Upon a principle already mentioned, if a man attempting to kill another miss his blow and kill himself, he is *felo de se*. (1 *Hale*, 412; 1 *Hawk. P. C.* c. 27, s. 4.)

Forfeiture. The offender herein doth incur a forfeiture of goods and chattels, but not of lands; for no man can forfeit his land without an attainder by course of law. (3 *Inst.* 54.)

Nor shall his goods be forfeited, until it be lawfully found by the oath of twelve men; and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the justices in sessions may inquire thereof; for they have power, by their commission, to inquire of all felonies; and a presentment thereof found before them entitles the king to the forfeiture. (3 *Inst.* 54, 55; *Dalt.* c. 144.)

But nevertheless, the forfeiture shall relate to the time of the wound given, and not to the time of the death, or of the inquisition. (3 *Inst.* 55; *Dalt.* c. 144; *Hale's Sum.* 29; 1 *Hawk.* c. 27, s. 10.)

But Lord *Hale*, in his history of the Pleas of the Crown, seemeth to doubt whether it shall not relate to the time of the death only, and not the time of the wound given. (1 *Hale*, 414.)

Corruption of blood.

Nor doth the offence work any corruption of blood or loss of dower. (1 *Hawk.* c. 27, s. 8.)

Burial.

Formerly he was to be buried ignominiously on the highway, with a stake driven through his body. (4 *Bl. Com.* 190.) But now, stat. 4 Geo. 4, c. 52, enacts, that it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo de se* shall be had, in any public highway; but that such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial ground of the parish or place in which the remains of such person might, by the laws or custom of England, be interred, if the verdict of *felo de se* had not been found against such person; such interment to be made within 24 hours from the finding of the inquisition, and to take place between the hours of 9 and 12 at night.

Sect. 2. Nothing herein contained shall authorise the performing of any of the rites of Christian burial on the interment of the remains of any such person as aforesaid; nor shall anything hereinbefore contained be taken to alter the laws or usages relating to the burial of such persons, except so far as relates to the interment of such remains in such churchyard or burial ground, at such time and in such manner as aforesaid.

VI. Attempts to Murder.

7. Forms.

24 & 25 Vict. c. 100, s. 11. Whosoever shall administer to or cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life or for any term not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 12. Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 13. Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 14. Whosoever shall attempt to administer to, or shall attempt to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shall shoot at any person, or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 15. Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than 3 years, or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement.

Sect. 16. Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding 10 years, and not less than 3 years; or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

VII. Forms.

The jurors for our lady the Queen upon their oath present, that C. D., General form
to wit, on the day of , in the year of our Lord , feloniously, wilfully, and of his malice aforethought, did kill and murder C. D., of indictment for
against the peace of our lady the Queen, her crown and dignity. murder.

*Hops.***Hops.** *Destroying of Hop Binds, see post, "Malicious Injuries to Personal Property;" Setting fire to Hop Oasts, see "Burning."***Hops** (a) (*Trade in*).

[48 Geo. 3, c. 134 ; 54 Geo. 3, c. 123 ; 29 Vict. c. 37.]

48 Geo. 3, c. 134.

By the 48 Geo. 3, c. 134, "An Act to amend the Laws relating to the marking of Bags and Pockets of Hops," it is enacted,

Bags and pockets of hops shall be marked with the parish and county of their growth, under penalty of 20*l*.

Sect. 1. That, in addition to the particulars required by law to be marked on the outside of every bag and pocket of hops, there shall be marked by the owner, planter, or grower of hops, in the form and manner in which the before-mentioned particulars are required to be marked, the name of the parish and of the county in which the hops put into any such bags or pockets were or shall be grown (b): and if any owner, planter, or grower of hops shall presume to put hops into any bag or pocket before the same shall have been marked in the form and manner by this act directed and required, he, she, or they shall, for each and every such offence, forfeit 20*l*.

Sect. 2 is repealed by 29 Vict. c. 37, s. 21.

Recovery and application of penalties.

Sect. 3. That all fines, penalties, and forfeitures imposed by this act shall be sued for, recovered, levied, or mitigated by such ways, means, or methods as any fine, penalty, or forfeiture may be sued for, recovered, levied, or mitigated by any law or laws of excise, or by action of debt, bill, plaint, or information in any of his Majesty's courts of record at Westminster, or in the Court of Exchequer in Scotland respectively; and that one moiety of every such fine, penalty, or forfeiture, shall be to his Majesty, his heirs and successors, and the other moiety to him or them who shall inform, discover, or sue for the same.

54 Geo. 3, c. 123.

And by the 54 Geo. 3, c. 123, "An Act to amend an Act of the thirty-ninth and fortieth year of his present Majesty, to prevent Frauds and Abuses in the Trade of Hops;" after reciting that it was enacted by the 39 & 40 Geo. 3, c. 81 (amongst other things), that every owner, planter, or grower of hops, before he shall begin to put any hops into any bag or pocket, shall mark or cause to be marked on the outside thereof his name and place of abode; and reciting also, that by the 48 Geo. 3, c. 134, it was enacted that every owner, planter, or grower of hops, shall also mark on the outside of every bag or pocket of hops, the name of the parish and of the county in which the hops are put into; it is enacted,

Growers of hops not to put any name or place of abode than their own on bags or pockets.

By sect. 1, that every owner, planter, or grower of hops, before he, she, or they shall begin to put any hops into any bag or pocket, shall mark, or cause to be marked, on the outside of each and every such bag, in large, plain, and legible letters of four inches in length at least, and half an inch in breadth, and on the outside of every such pocket, in large, plain, legible letters of three inches in length and half an inch in breadth at the least, with durable ink or paint, his, her, or their name or names, and the parish and county in which the said hops, to be packed therein, were actually grown; and if any owner, planter, or grower of hops, or any other person or persons shall put any hops into any bag or pocket, without having marked or caused to be marked thereon in manner hereinbefore directed, the several matters and things hereinbefore required and prescribed, or shall before or at any future time after such hops have been packed, or shall * mark or cause to be marked thereon the name of any other person, parish, or county, than as is hereinbefore directed or prescribed, or the symbol appertaining to, or anything denoting to be the

* *Sic.*

(a) The hop duty is now repealed; all acts relating to its collection are therefore omitted, and the following

statutes regulate the trade in hops.

(b) See the following enactment in the 54 Geo. 3, c. 123.

symbol of any other county or place, every such owner, planter, or grower, or other person or persons so offending shall, for every such offence, forfeit and pay the sum of 20*l.* for every such bag or pocket, to be recovered and applied in manner before directed.

Sect. 2. That if any owner, planter, or grower of hops shall knowingly put or suffer to be put any hops of different qualities and value in the same bag or pocket, every such owner, planter, or grower shall forfeit and pay the sum of 20*l.* for every such bag or pocket, to be recovered and applied in manner before directed.

By the 29 Vict. c. 37, "An Act to amend the 54 Geo. 3, c. 123, to prevent Frauds and Abuses in the trade of Hops;" after reciting the 48 Geo. 3, c. 134, and 54 Geo. 3, c. 123, and that the said acts have been found ineffectual for preventing frauds and abuses in the trade of hops, and it is expedient to amend the same :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. In the construction of this act the word "person" shall include any person, whether a subject of her Majesty or not, and any body corporate or body of the like nature; the words "trade mark" or "symbol" shall include any arms or coat of arms of any county, city, borough, town, or district, or any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, or other work of any other description lawfully used by any person to denote that the hops in any bag or pocket were grown or produced by such person in any particular parish, county, or place, or to denote the said hops to be of a particular quality or description; the words "bag" or "pocket" shall include any packet used for containing hops, or in which hops are packed and sent from the grower or producer to any factor, merchant, or brewer, or other person, either before or after a sale thereof.

Sect. 2. From and after the 21st August, 1866, every owner, planter, or grower of hops shall, within one month after the said hops shall have been packed in any bag or pocket, mark or cause to be marked with durable ink or paint on the outside of each and every bag containing hops, in plain and legible figures of 4 inches in length at the least, and half an inch in breadth, and on the outside of each and every pocket containing hops, in plain and legible figures of 3 inches in length at the least, and half an inch in breadth, in addition to his name, and in addition to the name of the parish and of the county in which the hops put into any such bag or pocket shall be grown, as required by the recited acts, the year in which such hops were actually grown, the true progressive number of each and every such bag or pocket according to the numbers of the bags or pockets of hops grown and weighed by such owner, planter, or grower of hops during the then current year, and the true gross weight, in hundredweights, quarters, and pounds, of each and every such bag or pocket.

Sect. 3. If after the 21st August, 1866, any owner, planter, or grower of hops, or any other person, shall not mark or cause to be marked on such bag or pocket, in manner directed by the said recited acts, and by the last preceding section of this act, the several matters and things required and prescribed, every such owner, planter, grower, or other person so offending shall for every such offence forfeit and pay the sum of 20*l.* for every such bag or pocket.

Sect. 4. If after the said 21st August, 1866, any owner, planter, or grower of hops, or any person to whom any hops shall have been consigned for sale or otherwise, or any other person, shall mark or cause to be marked on any bag or pocket, either before or at any time after any hops shall have been packed therein, the name of any person, parish, or county other than the name of the planter or grower of such hops, and the parish and county in which the said hops shall have

Hops.

54 Geo. 3, c. 123.
Penalty.

Hop-planters
packing different
hops in bag.

Penalty.

29 Vict. c. 37.

Construction of
terms.

Growers, &c., to
mark each bag or
pocket with year
when hops were
actually grown,
the true progres-
sive number and
gross weight
thereof.

Growers, &c., not
marking bags or
pockets as directed
by the said recited
acts and this act
subject to a
penalty.

Growers, &c.,
marking false de-
scription, symbol,
or trade mark,
subject to penalty.

Hops.

29 Vict. c. 37.

Penalty on growers, &c., mixing hops of different qualities and value.

Penalties on persons selling or exposing for sale hops in bags or pockets not marked or improperly marked.

Proviso in favour of persons selling, &c., *bonâ fide* under belief that bags or pockets were duly marked.

Penalty on re-bagging foreign hops in British bags.

Penalty on persons wilfully altering marks.

been actually grown, or if such owner, planter, grower, consigner, or other person shall at any time mark or cause to be marked on any such bag or pocket containing hops the symbol appertaining to any county or place, or any imitation thereof, other than that in which the said hops shall have been actually grown, or any year other than that in which the said hops shall have been actually grown, or any weight other than the true gross weight of every such bag or pocket of hops, or any trade mark not being the trade mark of the owner, planter, or grower of the hops therein contained, and by him usually used to denote the real owner, planter, or grower of, and the parish, county, or place in which such hops were actually grown, every such owner, planter, grower, consignee, or other person so offending shall for every such offence forfeit and pay the sum of 20*l.* for every such bag or pocket.

Sect. 5. Every person who shall put or suffer to be put any hops of different qualities or value in the same bag or pocket, so that a sample shall not correspond with and truly represent the bulk, or who shall sell or expose for sale, or cause to be sold or exposed for sale, any such hops in such bag or pocket, shall forfeit and pay for every such bag or pocket the sum of 20*l.*: Provided always, that no person shall be liable to the aforesaid penalty or forfeiture who shall prove that he did the act or acts charged against him and mentioned in this section *bonâ fide*, and without intent to defraud.

Sect. 6. Every person who after the 21st August, 1866, shall sell or expose for sale, or cause or procure to be sold or exposed for sale, any hops contained in any bag or pocket, not having marked thereon in manner before directed the several matters and things by the said recited acts and by this act prescribed, or which shall, at the time of the said sale or exposure for sale, have marked thereon the name of any other person, parish, or county than is directed and prescribed as aforesaid, or any symbol or trade mark appertaining to any county or place other than that in which the said hops shall have been actually grown, or any imitation thereof, and not being the trade mark of the owner, planter, or grower of the hops therein contained, and by him usually used to denote the real owner, planter, or grower of, and the county or place in which such hops were actually grown, or any year other than that in which the said hops shall have been actually grown, or any weight other than the true gross weight of any such bag or pocket of hops, shall for every such offence forfeit and pay a sum of money equal to the then market value of the bag or bags, pocket or pockets of hops so sold or exposed for sale, and a further sum of money not exceeding 10*l.* and not less than 5*l.*: Provided always, that no person shall be liable to the aforesaid forfeitures or penalties, or any of them, in respect of any false description, trade mark or symbol, or imitation thereof, marked on any bag or pocket, who shall *bonâ fide* sell or expose for sale any hops as in this section aforesaid, who shall *bonâ fide* believe, and having good reason for believing (proof whereof shall be upon such person), that the description, trade marks, and symbols, or imitations thereof, at the time of such sale or exposure for sale, marked on the bag or bags, pocket or pockets, so sold or exposed for sale were genuine and in accordance with the provisions of this and the said recited acts.

Sect. 7. No person whatsoever shall after the 21st August, 1866, take or suffer to be taken any hops of foreign growth out of the bags in which they are imported, and re-bag the same in British bags or pockets, in order to sell, dispose of, or export the same as British hops, under the penalty of 10*l.* for every hundredweight, and after that rate for a greater or lesser quantity.

Sect. 8. Every person who shall wilfully deface or obliterate, add to or alter, any or either of the matters or things directed to be marked by this act, and marked on any bag or pocket containing hops, or who

shall wilfully deface, obliterate, add to, or alter any trade mark or symbol marked on any bag or pocket containing hops, or who shall cause or procure any of the aforesaid matters or things, or any such trade mark or symbol as aforesaid, to be defaced, obliterated, added to, or altered, or who shall connive at any such matter or thing, trade mark or symbol, being so defaced, obliterated, added to, or altered, with intent to represent, or to cause it to be believed, or as shall be calculated or likely to cause it to be believed, that any hops contained in any bag or pocket were grown by any person or in any county or place other than the real person, county, or place by and in which the same were grown, shall for every such defacement, obliteration, addition, or alteration forfeit and pay the sum of 20*l*. for and in respect of each bag or pocket whereon any such defacement, obliteration, alteration, or addition shall be made.

Sect. 9. Where any person who at any time after the 21st August, 1866, shall have sold hops contained in any bag or pocket marked with any name, trade marks, symbol, or other description, contrary to this and the said recited acts, or not marked according to the provisions of this act and the said recited acts, such person shall be bound, upon demand in writing delivered to him or left for him at his last known dwelling house, counting-house, office of business, or place of abode, by or on behalf of the person to whom the said hops shall have been sold, or of any other person who may have afterwards purchased the same, to give the person requiring the same, or his attorney or agent, within 48 hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained the said hops, and of the time when he purchased or obtained the same; and it shall be lawful for any justice of the peace, upon information upon oath of such demand and refusal, to summon before him the party refusing, and, on being satisfied that such demand ought to be complied with, to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay the sum of 5*l*., and such refusal or neglect shall be deemed conclusive evidence as against the person so refusing that he sold the said hops with full knowledge that the said name, trade mark, symbol, or other description was contrary to the said recited acts and this act.

Sect. 10. If after the 21st August, 1866, it shall be made appear to any justice of the peace, upon information upon oath, that hops contained in any bag or pocket, or any bag or bags, pocket or pockets, are in the care or custody of any person, which bag or bags, pocket or pockets, there is good reason to believe, is or are not marked as required by, or has or have thereon any mark contrary to this act and the said recited acts, it shall be lawful for such justice to issue his warrant to any constable or constables empowering or requiring him or them to enter upon any place or places where such hops, bag or bags, pocket or pockets, may be, and to take with him or them all necessary persons, and there to search for the said hops, bag or bags, pocket or pockets, and if he or they shall find there any hops in any bag or pocket, or any bag or bags, pocket or pockets, which he shall *bonâ fide* believe to be marked contrary to, or not to be marked as by the said acts and this act required, to seize the said hops, bag or bags, and pocket or pockets, and to detain the same for a space of time not exceeding one month, or such further time as any justice of the peace may order.

Sect. 11. In every proceeding and document whatsoever in which any description, trade mark, or symbol, or imitation thereof, marked on any bag or pocket, or any part or parts thereof, shall be intended to be mentioned, it shall not be necessary to set forth any copy or facsimile thereof, and it shall be sufficient to describe the same generally

Hops.

29 Vict. c. 37.

Vendor selling hops falsely marked to give information as to persons from whom he purchased or obtained the hops.

Power of justice to order search for bags or pockets improperly marked.

Description, trade mark, or symbol may be described generally.

Hops.

29 Vict. c. 37.

Conviction not to affect any right or civil remedy.

Recovery of penalties.

Summary proceedings before justices to be within 11 & 12 Vict. c. 43.

How penalties recovered by action are to be disposed of.

Plaintiff entitled to costs.

How penalties recovered by summary proceedings disposed of.

Limitation of action.

Vendor to be deemed to contract that description, &c., is genuine.

Party aggrieved

as being a description, trade mark, or symbol, in imitation thereof, contrary to the said recited acts and this act.

Sect. 12. No proceeding under this act or the recited acts shall take away, diminish, or prejudicially affect any civil remedy which the person aggrieved may be entitled to at law or in equity or otherwise, or exempt or excuse any person from answering or making discovery upon examination as a witness, or upon interrogatories or otherwise, in any suit or other civil proceeding: Provided always, that no evidence, statement, or discovery which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any proceeding under this act or the said recited acts.

Sect. 13. Where any person shall have committed any offence under this act or the said recited acts, whereby he shall have forfeited or become liable to pay any sum of money, every such penalty or sum of money may be recovered in manner provided by sect. 15 of "The Merchandise Marks Act, 1862."

Sect. 14. In every case in which any penalty or sum of money forfeited as hereinbefore mentioned shall be sought to be recovered by a summary proceeding before 2 justices of the peace, the offence or act by the committing or doing of which such penalty or sum of money shall have been so forfeited shall be and be deemed to be an offence and act within the meaning of 11 & 12 Vict. c. 43, see "*Justices*." And the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited shall be had according to the provisions of the said act.

Sect. 15. In every case in which judgment shall be obtained in any action for the amount of any penalty or sum of money forfeited as aforesaid, the amount of such penalty or sum of money in respect of which such judgment was so recovered as aforesaid shall be paid by the defendant to the sheriff or officer entitled to levy, demand, or receive the same, who shall account for one moiety thereof in like manner as other monies payable to her Majesty, and shall pay the other moiety to the plaintiff; and, if it be not paid, the said penalty or sum of money may be recovered, or the amount thereof levied, or the payment thereof enforced by execution or other proper proceeding as money due to her Majesty; and any plaintiff suing on behalf of her Majesty upon obtaining judgment shall be entitled to recover and have execution for all the costs of suit, which shall include a full indemnity for all costs and charges which he shall or may have expended or incurred in, about, or for the purposes of the action, unless the Court or a judge thereof shall direct that costs of the ordinary amount only shall be allowed.

Sect. 16. One moiety of any penalty or sum of money recovered by summary proceeding as aforesaid shall be deemed money payable to her Majesty, and the other moiety shall be paid by the justices to the complainant.

Sect. 17. No person shall commence any action or proceeding for the recovery of any penalty after the expiration of 3 years next after the committing of the offence, or should discovery thereof not be made within the said 3 years, then no person shall commence any action or proceeding for the recovery of any penalties after the expiration of one year next after the said discovery of the offence.

Sect. 18. Every person who after the 21st August, 1866, shall sell any hops in any bag or pocket having marked thereon any name, description, date, trade mark, or symbol intended to indicate the name of the person by whom, or the parish, county, or place where, or the year when the said hops were grown, shall be deemed to contract that the said description, date, trade mark, and symbol were genuine and true, and that such description, date, trade mark, and symbol were in accordance with this and the said recited acts.

Sect. 19. In every case in which any person shall do or cause to be

done any act contrary to this or the said recited acts, every person aggrieved by any such wrongful act shall be entitled to maintain an action or suit for damages in respect thereof against the person who shall be guilty of having done such act, or causing or procuring the same to be done.

Sect. 20. The provisions of sections 23 and 24 of "The Merchandise Marks Act, 1862," shall be considered as incorporated in this act as fully as if the same were here set forth and re-enacted at length.

Sect. 22. The expression "The Hop (Prevention of Frauds) Act, 1866," shall be a sufficient description of this act.

Hops.

29 Vict. c. 37.
may recover
damages.

Provisions of
25 & 26 Vict. c. 88,
incorporated.

Short title.

Horses and Horse-Racing.

AS to post-horse duties, see tit. "*Excise, horses let to hire.*"

As to race-horse duties, see "*Excise, race-horse duties.*"

As to taxes on horses, see tit. "*Taxes.*"

As to the killing and maiming of, see tit. "*Cattle.*"

As to the stealing of, see tit. "*Larceny.*"

As to putting stoned and scabbed horses on commons, see "*Common.*"

I. *Buying Stolen Horses, &c.*, p. 1347.

II. *Slaughtering of*, p. 1351.

III. *Horse-Racing*, p. 1359.

I. Buying Stolen Horses, &c.

[2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12.]

The 2 & 3 Ph. & M. c. 7, intituled, "An Act against the buying of stolen horses," enacts by sect. 2, that the owner, governor, ruler, fermor, steward, bailiff, or chief keeper of every fair and market overt within this realm, and other the Queen's dominions, shall, before the feast of Easter next, and so yearly, appoint and limit out a certain and special open place within the town, place, field, or circuit, where horses, mares, geldings, and colts have been and shall be used to be sold in any fair or market overt; in which said certain and open place as is aforesaid there shall be by the said ruler or keeper of the said fair or market, put in and appointed one sufficient person or more to take toll, and keep the same place from ten of the clock before noon until sunset of every day of the aforesaid fair and market, upon pain to lose and forfeit for every default 40s.; and that every toll-gatherer, his deputy or deputies, shall, during the time of every the said fairs and markets, take their due and lawful tolls for every such horse, mare, gelding, or colt, at the said open place to be appointed as is aforesaid, and betwixt the hours of ten of the clock in the morning and sunset of the same day, if it be tendered, and not at any other time or place; and shall have presently, before him or them, at the taking of the same toll, the parties to the bargain, exchange, gift, contract, or putting away of every such horse, mare, gelding, or colt, and also the same horse, mare, gelding, and colt so sold, exchanged, or put away; and shall then write or cause to be written in a book to be kept for that purpose, the names, surnames, and dwelling-places of all the said parties, and the colour, with one special mark at the least, of every such horse, mare, gelding and colt; on pain to forfeit at and for every default, contrary to the tenor thereof, 40s.

Sect. 3. And the said toll-gatherer or keeper of the said book shall, within one day next after every such fair or market, bring and deliver

2 & 3 Ph. & M. c. 7.
Former misuse in
sale of stolen
horses.

How horses to be
sold in fairs or
markets.

A place to be ap-
pointed for a horse
fair, and also a
toll-taker.

When, where, and
of whom, toll for
horses shall be
taken.

A note of all horses
sold in a market,
&c., to be taken.

1. *Buying stolen horses, &c.*

2 & 3 Ph. & M. c. 7.

The using of a stolen horse in a fair, or &c., before the owner's property shall be taken away.

Owner empowered to retake horse.

Penalties, who entitled to and how recoverable.

Justices to hear and determine offences aforesaid.

Allowance for the book-keeper where no toll due.

his said book to the owner, governor, ruler, steward, bailiff, or chief keeper of the said fair or market, who shall then cause a note to be made of the true number of all horses, mares, geldings and colts, sold at the said market or fair, and shall there subscribe his name or set his mark thereunto; upon pain to him that shall make default therein, to lose and forfeit for every default 40s., and also answer the party aggrieved by reason of the same his negligence in every behalf.

Sect. 4. The sale, gift, exchange, or putting away, after the last day of February now next coming, in any fair or market overt, of any horse, mare, gelding, or colt, that is or shall be thievishly stolen, or feloniously taken away from any person or persons, shall not alter, take away, nor exchange the property of any person or persons to or from any such horse, mare, gelding or colt, unless the same horse, mare, gelding, or colt shall be, in the time of the said fair or market wherein the same shall be so sold, given, exchanged, or put away, openly ridden, led, walked, driven, or kept standing by the space of one hour together at the least, betwixt ten of the clock in the morning and the sun setting, in the open place of the fair or market wherein horses are commonly used to be sold, and not within any house, yard, back-side, or other privy or secret place, and unless all the parties to the bargain, contract, gift or exchange, present in the said fair or market, shall also come together, and bring the horse, mare, gelding, or colt, so sold, exchanged, given, or put away, to the open place appointed for the toll-taker, or for the book-keeper where no toll is due, and there enter, or cause to be entered, their names and dwelling-places in manner as is aforesaid, with the colour or colours, and one special mark at the least, of every the same horses, mares, geldings, or colts, in the toll taker's book, or in the keeper's book for that purpose where no toll is due, as is aforesaid, and also pay him their toll, if they ought to pay any; and if not, then the buyer to give one penny for the entry of their names, and executing the other circumstances afore rehearsed, to him that shall write the same in the said book.

Sect. 5. And if any horse, mare, gelding, or colt, that is or shall be thievishly stolen or taken away, shall, after the said last day of February next coming, be sold, given, exchanged, or put away in any fair, or market, and not used in all points according to the tenor and intent of this estatute, that then the owner of every such horse, mare, gelding, or colt, shall and may by force of this estatute seize or take again the said horse, mare, gelding, or colt, or have an action of detinue or replevin for the same; any sale, gift, exchange, or putting away of any such horse, mare, gelding, or colt, other than according to this estatute, in any wise notwithstanding.

Sect. 6. The one-half of all which forfeitures to be to the King and Queen's Majesties, her heirs, and successors, and the other to him or them that will sue for the same before the justices of peace, or in any of the King's and Queen's Majesties' ordinary courts of record, by bill, plaint, action of debt, or information, in which suits no protection, essoin, or wager of law shall be allowed.

Sect. 7. The justices of the peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to inquire, hear, and determine all offences against this estatute, as they may do any other matter triable before them.

Sect. 8. In every such fair or market, where any toll is nor shall be due ne leviabie by reason of the freedom, liberty, or privilege of the said fair or market, the keeper or keepers of the book, touching the execution of this present act, shall take nor exact but one penny upon and for every contract, for his labour in writing the entry concerning the premises in manner and form as is before declared.

The stat. 31 Eliz. c. 12, intituled, "An Act to avoid horse-stealing," recites,

Sect. 2. That no person shall, in any fair or market, sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, unless the toll-taker there, or (where no toll is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell or offer to sell, give, or exchange, any horse, mare, gelding, colt, or filly, and of his true Christian name, surname, and place of dwelling or resiancy, and shall enter all the same his knowledge into a book there kept for sale of horses; or else, that he so selling or offering to sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, shall bring unto the toll-taker, or other officer aforesaid, of the same fair or market, one sufficient and credible person that can, shall, or will testify and declare unto and before such toll-taker, book-keeper, or other officer, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, and his true name, surname, mystery, and dwelling place, and there enter or cause to be entered in the book of the said toll-taker or officer, as well the true Christian name, surname, mystery, and place of dwelling or resiancy of him that so selleth, giveth, exchangeth, or putteth away such horse, mare, gelding, colt, or filly, as of him that so shall testify or avouch his knowledge of the same person; and shall also cause to be entered the very true price or value that he shall have for the same horse, mare, gelding, colt, or filly so sold; and that no person shall take upon him to avouch, testify, or declare that he knoweth the party that so shall offer to sell, give, exchange, or put away any such horse, mare, gelding, colt, or filly, unless he do indeed truly know the same party, and shall truly declare to the toll-taker or other officer aforesaid, as well the Christian name, surname, mystery, and place of dwelling and resiancy of himself, as of him of and for whom he maketh such testimony and avouchment; and that no toll-taker or other person keeping any book of entry of sales of horses in fairs or markets shall take or receive any toll, or make entry of any sale, gift, exchange, or putting away of any horse, mare, gelding, colt, or filly, unless he knoweth the party that so selleth, giveth, exchangeth, or putteth away any such horse, mare, gelding, colt, or filly, and his true Christian name, surname, mystery, and place of his dwelling or resiancy, or the party that shall and will testify and avouch his knowledge of the same person so selling, giving, exchanging, or putting away such horse, mare, gelding, colt, or filly, and his true Christian name, surname, mystery, and place of dwelling or resiancy, and shall make a perfect entry into the said book of such his knowledge of the person, and of the name, surname, mystery, and place of the dwelling or resiancy of the same person, and also the true price or value that shall be *bond fide* taken or had for any such horse, mare, gelding, colt, or filly, so sold, given, exchanged, or put away, so far as he can understand the same, and then give to the party so buying or taking by gift, exchange, or otherwise, such horse, mare, gelding, colt, or filly, requiring and paying 2*d.* for the same, a true and perfect note in writing of all the full contents of the same, subscribed with his hand; on pain that every person that so shall sell, give, exchange, or put away, any horse, mare, gelding, colt, or filly, without being known to the toll-taker or other officer aforesaid, or without bringing such a voucher or witness, causing the same to be entered as aforesaid, and every person making any untrue testimony or avouchment in the behalf aforesaid, and every toll-taker, book-keeper, or other officer of fair or market aforesaid, offending in the premises contrary to the true meaning aforesaid, shall forfeit for every such default the sum of 5*l.*; but also that every sale, gift, exchange, or other putting away of any horse, mare, gelding, colt,* filly, in fair or market, not used in all points according to the

1. *Buying stolen horses, &c.*

31 Eliz. c. 12.

Sellers of horses in markets, &c., must be known to toll-taker, or some other who will avouch the sale, which shall be entered in toll-book, &c.

A sufficient and credible person shall avouch the horse-seller.

Price of horse to be entered in tollers' book.

A note in writing shall be given to the buyer.

Penalty of person offending in cases aforesaid.

Sale otherwise void.

* *Sic.*

1. *Buying stolen horses, &c.*

31 Eliz. c. 12.

Justices may hear and determine offences aforesaid.

true meaning aforesaid, shall be void; the one-half of all which forfeitures to be to the Queen's Majesty, her heirs and successors, and the other half to him or them that will sue for the same before the justices of peace, or in any of her Majesty's ordinary courts of record, by bill, plaint, action of debt or information; in which no essoin or protection shall be allowed.

Sect. 3. The justices of peace of every place and county, as well within liberties as without, shall have authority in their sessions, within the limits of their authority and commission, to inquire, hear, and determine all offences against this statute as they may do any other matter triable before them.

Sect. 4. If any horse, mare, gelding, colt, or filly, after 20 days next ensuing the end of this session of Parliament, shall be stolen, and after shall be sold in open fair or market, and the same sale shall be used in all points and circumstances as aforesaid, that yet, nevertheless, the sale of any such horse, mare, gelding, colt, or filly, within 6 months next after the felony done, shall not take away the property of the owner from whom the same was stolen, so as claim be made within 6 months by the party from whom the same was stolen, or by his executors or administrators, or by any other by any of their appointment, at or in the town or parish where the same horse, mare, gelding, colt, or filly shall be found, before the mayor or other head officer of the same town or parish, if the same horse, mare, gelding, colt or filly shall happen to be found in any town corporate or market town, or else before any justice of peace of that county near to the place where such horse, mare, gelding, colt, or filly shall be found, if it be out of a town corporate or market town; and so as proof be made within 40 days then next ensuing by two sufficient witnesses, to be produced and deposed before such head officer or justice (who, by virtue of this act, shall have authority to minister an oath in that behalf), that the property of the same horse, mare, gelding, colt, or filly so claimed, was in the party by or from whom such claim is made, and was stolen from him within 6 months next before such claim of any such horse, mare, gelding, colt, or filly; but that the party from whom the said horse, mare, gelding, colt, or filly was stolen, his executors or administrators, shall and may at all times after, notwithstanding any such sale or sales in any fair or open market thereof made, have property and power to have, take again, and enjoy the said horse, mare, gelding, colt, or filly, upon payment, or readiness or offer to pay to the party that shall have the possession and interest of the same horse, mare, gelding, colt, or filly, if he will receive and accept it, so much money as the same party shall depose and swear before such head officer or justice of peace (who by virtue of this act shall have authority to minister and give an oath in that behalf) that he paid for the same *bonâ fide* without fraud or collusion; any law, statute, or other thing to the contrary thereof in anywise notwithstanding.

Owner may redeem a horse stolen from him within six months after, paying the price.

Observations on the stat. 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12.

For the decisions on these statutes, see *Bac. Ab. "Fairs and Markets," Com. Dig. "Market," E.*; 2 *Inst.* 719; 2 *Bla. Com.* 450; 1 *Chit. Col. Statutes*, "*Horses*," 36.

If a horse has been stolen, and the requisites of the above statutes have not been duly observed, the owner may at any time retake his horse wherever he happens to find him, or bring an action for it at his election. (2 *Bla. Com.* 451; 2 *Chitty Com. L.* 151). And if the seller is entered in the toll book by a false name, the property is not altered. (*Gibb's case*, *Owen*, 27; 1 *Leon*. 158, *S. C. contra*; *Cro. Eliz.* 86; *Barker v. Reading*, *Sir W. Jones*, 163; 2 *Inst.* 717; *Com. Dig. "Market," E.* But see *Wikes v. Morefoots*, *Cro. Eliz.* 86.)

Unless, however, the horse was stolen, a magistrate has no authority to restore it; and therefore, where a complaint was made to a magistrate by A. the owner, that his horse had been stolen by B. with-

out actual proof of its having been stolen; it was held, that an officer, although armed with a warrant against B., is not justified, under the 31 Eliz. c. 12, s. 4, in taking the horse out of the possession of the *bond fide* purchaser from B. (*Josephs v. Adkins*, 2 Stark. 76.)

The statutes extend to horses wrongfully taken, though not stolen. (2 Inst. 717; *Barker v. Reading*, Sir W. Jones, 163; *Com. Dig.* "Marlet." E.)

It has been held, that, if a party has good reason to believe that his horse has been stolen, he cannot maintain trover against the person who bought the horse of the supposed thief, without first doing all in his power, and what can be reasonably expected of him, to bring the thief to justice and convict him. (*Grimson v. Woodfall*, 2 C. & P. 41; and *Id.* 43, n.; *Peer v. Humphrey*, 2 A. & E. 499.) This is required of the owner on the score of public policy; but the rule does not, it would seem, apply to third parties prosecuting. Nor need the owner first prosecute where the action is founded on a contract.

In *Peer v. Humphrey* (2 A. & E. 495), where property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased *bond fide*, but not in market overt. The plaintiff gave notice of the felony to the defendant, who afterwards sold the property in market overt. After which the plaintiff prosecuted the felon to conviction. Held, that the plaintiff might recover from the defendant the value of the property in trover.

26. Slaughter-
ing
of horses.

II. Regulations as to the Slaughtering of Horses, &c.

[26 Geo. 3, c. 71; 5 & 6 Will. 4, c. 59, ss. 7, 8; 7 & 8 Vict. c. 87.]

As to where a slaughter-house may be deemed a nuisance, see tit. "Nuisance."

The 26 Geo. 3, c. 71, s. 1, intituled, "An Act for regulating houses and other places kept for the purpose of slaughtering horses," recites, that no person or persons shall keep or use any house or place for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butcher's meat, without first taking out a licence for that purpose at the general quarter sessions held for the county, riding, city, town, district, division, or liberty wherein such slaughtering house or place shall be situate (a); and the justices of the peace, at their general quarter sessions assembled, are hereby authorised and empowered to grant such licences as aforesaid, upon a certificate under the hands and seals of the minister and churchwardens, or overseers, or of the minister and two or more substantial householders of the parish wherein the person or persons applying for such licence shall dwell, that such person or persons is or are fit and proper to be trusted with the management and carrying on such business as aforesaid: Provided always, that, in case of the death of any person to whom such licence as aforesaid shall be granted, it shall and may be lawful for the widow or personal representative of such person so dying to carry on the said business until the then next ensuing general quarter sessions of the peace.

Sect. 2. Every such licence shall be signed by the justices of the peace assembled at such general quarter sessions, or by the major part of them, and a copy of every such licence shall be entered in a book to be kept for that purpose by the clerk of the peace of the county wherein the same shall be so granted as aforesaid; and that all and every person and persons shall have liberty at all times (Sundays excepted),

26 Geo. 3, c. 71.
Slaughtering
house keepers to
take out a licence,
&c.

Justices to grant
licences, &c.,
which are to be
entered, &c.

(a) Such licence is to be annual, 7 & 8 Vict. c. 87, s. 1, *post* (p. 1357), and may be cancelled, *post* (p. 1357).

2. *Slaughtering of horses.*

26 Geo. 3, c. 71.

Persons licensed, to affix to their houses the words herein.

Previous notice to be sent, when horses, &c., are intended to be slaughtered, to the inspector, who is to take an account of the beasts.

Times of slaughtering, &c.

Account to be kept, by the owners of slaughtering houses, of the owners of the cattle brought, &c.

Vestry to appoint inspectors,

between the hours of 10 and 12 of the clock in the forenoon, to search the office of such clerk of the peace wherein any such copy shall be entered or kept, and to make an extract or extracts from the same, paying for every such search the sum of 6d.; and all and every person and persons so licensed as aforesaid shall cause to be painted or affixed over the door or gate of the house or place where he, she, or they shall carry on the said business, in large legible characters, his, her, and their name and names, with the words "Licensed for slaughtering horses, pursuant to an act passed in the twenty-sixth year of his Majesty King George the Third."

Sect. 3. Every occupier and occupiers of every such licensed slaughtering house or place shall, 6 hours previous to the slaughtering or killing of any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed, for the purpose of butcher's meat, and previous to the flaying any such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, brought dead to such slaughtering house, or other place, give notice in writing to a person to be appointed in manner hereinafter mentioned as inspector, to the intent that such inspector may, upon such notice as aforesaid, and before any such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle shall be slaughtered, killed, or flayed, take an exact account and description of the height, age (as near as may be), colour, and particular marks of every horse, mare, gelding, foal or filly, ass or mule, brought alive for the purpose of being slaughtered or killed, or brought dead as aforesaid, and of the colour and particular marks of every cow, bull, heifer, ox, calf, sheep, hog, goat, or other cattle brought alive or dead for either of the purposes aforesaid; and no such horse, mare, gelding, foal or filly, ass, mule, ox, bull, cow or heifer, calf, sheep, hog, goat, or other cattle shall be slaughtered, killed, or flayed, but between the hours of 8 of the clock in the morning, and 4 of the clock in the evening, during the months of October, November, December, January, February, and March; and between the hours of 6 of the clock in the morning, and 8 of the clock in the evening, during the months of April, May, June, July, August, and September, in every year.

Sect. 4. Every person so licensed as aforesaid shall, at the time any horse, mare, or gelding, colt, filly, ass, or mule, or any ox, bull, cow, heifer, calf, sheep, hog, goat, or any other cattle, shall be brought for the purpose of slaughtering, killing, or flaying, make or cause to be made an entry in a book to be kept for that purpose, in a fair legible hand, of the name and names, place and places of abode, profession and professions of the owner or owners thereof, and also of the person and persons who shall bring the same to be slaughtered, killed, or flayed, and the reason or reasons why the same is brought to be slaughtered, killed, or flayed, which reason and reasons the person or persons bringing the same is and are hereby required to declare to such person or persons so licensed as aforesaid; which book shall at all times be open for the perusal and examination of the inspector and inspectors to be appointed under this act; and all and every such licensed person and persons shall at all times attend with and produce such book before any one justice of the peace for the county, city, liberty, or place, where such licensed slaughtering house or place shall be situate, when required by warrant or order under the hand and seal of such justice of the peace so to do, and shall likewise produce the same at every general quarter sessions of the peace which shall be held in and for the said county.

Sect. 5. Such of the parishioners as by law are entitled to meet in vestry for the purpose of choosing parish officers, shall, in every parish wherein any such slaughtering house or place shall be situated, annually, or oftener as occasion may require, appoint one or more

proper person or persons to be an inspector or inspectors to inspect, every such slaughtering house and place as aforesaid, to whom all and every occupier and occupiers, person and persons carrying on such business as aforesaid, shall, 6 hours previous to his, her, or their slaughtering, killing, or flaying any such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, give notice in writing of his, her, or their intention so to do; and such inspector or inspectors shall in person, or by his or their servant or servants, attend at the slaughtering house or place of the person or persons so giving such notice, and there take such account and description as hereinbefore directed; and every such inspector shall, and is hereby required to keep a book or books, and therein to make an entry of every such account and description; and every such occupier or person carrying on such business as aforesaid shall, for every such entry, pay to every such inspector 6d.; and all and every person and persons desiring to inspect such book or books shall have access to the same at all times between the hours of 8 of the clock in the morning, and 5 in the evening, during the months of October, November, December, January, February, and March, and between the hours of 6 of the clock in the morning, and 8 in the evening, during the months of April, May, June, July, August, and September, in every year, paying to such inspector for every such search the sum of 6d., and no more; and every such inspector so appointed as aforesaid shall cause to be painted or affixed over the door of the house where he resides his name and the words "Inspector of houses and places for slaughtering horses;" and in case such inspector or inspectors shall, upon examination of any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, intended to be slaughtered or killed, have reason to believe, or be of opinion, that such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, is or are free from disease, and in a sound and serviceable state, or that the same has been stolen or unlawfully come by, he or they shall have power, and is and are hereby authorised and required, to prohibit the slaughtering or killing of any such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, for any time not exceeding the space of 8 days; and in the meantime shall, and is and are hereby directed and required to cause an advertisement or advertisements to be inserted in the "Daily Advertiser," or some public newspaper circulated in the county where such slaughter house or place shall be situated, twice or oftener, unless the owner or owners of such horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle shall sooner claim the same, to certify under his, her, or their hand or hands to, or otherwise satisfactorily inform the said inspector or inspectors, that he, she, or they sent or delivered, or caused the said horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other such cattle to be delivered to the said person or persons so licensed for the purpose of being slaughtered or killed, the expense of inserting such advertisement or advertisements as aforesaid to be paid by the occupier or occupiers of such slaughtering house or place to such inspector or inspectors; and in case such occupier or occupiers of such slaughtering house or place shall refuse to defray or pay the same, and shall be thereof convicted on the oath of any such inspector as aforesaid, before any one justice of the peace for the county or district wherein such slaughtering house or place shall be situated, he, she, or they shall forfeit double the amount of the charge of such advertisement or advertisements, to be raised by distress and sale of the goods and chattels of such offender or offenders, by warrant under the hand and seal of any such justice as aforesaid; and the form of such conviction shall be as follows:—

2. *Slaughtering of horses.*

26 Geo. 3, c. 71.

Inspector's duty.

2. *Slaughtering of horses.*

26 Geo. 3, c. 71.

Form of conviction for refusing to pay for advertisements of inspectors.

Inspectors may visit slaughtering houses at all times.

Persons bringing cattle refusing to give an account of themselves, &c., may be carried before a justice.

Justices may commit suspected persons.

"A. B. is convicted on the oath of C. D., inspector of houses and places for slaughtering horses for the parish of E. in the county of D., of refusing to pay the sum of _____, being the expense of an advertisement [or, "advertisements," as the case may be], inserted in the Daily Advertiser or some other public newspaper circulated in the county [as the case may be], pursuant to the directions of the statute in that case made and provided. Given under my hand and seal this _____ day of _____ F. G."

Sect. 6. It shall and may be lawful to and for every inspector so appointed as aforesaid, at all times in the day or night, but if in the night then in the presence of a constable, to go to, enter into, and inspect any house or place kept for slaughtering or killing horses by any person or persons licensed as aforesaid; and also any stable, building, shed, yard, or place belonging thereto, and then and there to examine, search for, and see if any horse, mare, gelding, foal, filly, ass, or mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, is or are deposited, or have been brought there, and to take an account thereof; and all and every person and persons so licensed as aforesaid, having, keeping, or using any such house or place for slaughtering horses, shall and is, and are hereby directed and required, to permit and suffer any such inspector as aforesaid, at all times in the day and night, but if in the night, then in the presence of a constable, to enter into and inspect such house or place, and also any stable, building, shed, yard, or premises belonging thereto, and freely to examine, search for, and see any horse, mare, gelding, foal, filly, ass, or mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, then and there being, and to take such account as hereinbefore directed.

Sect. 7. In case any person or persons who shall offer to sale, or shall bring any horse, mare, gelding, foal, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, to any person or persons keeping such slaughtering house or place as aforesaid, to be slaughtered or killed, or being dead, to be flayed or skinned, shall not be able, or shall refuse to give a satisfactory account of himself, herself, or themselves, or of the means by which the same came into his, her, or their possession; or if there shall be any reason to suspect that such horse, mare, gelding, foal, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle is or are stolen, or otherwise unlawfully obtained, it shall and may be lawful for the person or persons keeping such slaughtering house or place as aforesaid, to whom the same shall be brought or offered to sale, and for his, her, or their servants, agents, or assistants, and also for the said inspector or inspectors, or his or their servant or servants as aforesaid, to seize and detain such person or persons, and also every such horse, mare, gelding, foal, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, so brought or offered to sale as aforesaid, and to deliver such person or persons, as soon as conveniently may be, into the custody of a constable or other peace officer, who shall and is hereby required immediately to convey such person or persons before a justice of the peace for the county, riding, division, city, liberty, or place where the offence shall be committed; and if such justice shall, upon examination and inquiry, have cause to suspect that such horse, mare, gelding, foal, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, is or are stolen or unlawfully obtained, it shall and may be lawful for such justice to commit such person or persons into safe custody for any time not exceeding the space of 6 days, in order to be further examined; and if upon either of the said examinations such justice shall be satisfied, or have reason to believe, that such horse, mare, gelding, foal, filly, ass, mule, bull, cow, ox, heifer, calf, sheep, hog, goat, or other cattle, is or are stolen or illegally obtained, the said justice is hereby authorised and required to commit the person or persons so bringing or offering the same to

sale to the common gaol or house of correction of the county, riding, division, city, liberty, or place wherein the offence shall be committed, there to be dealt with according to law.

Sect. 8. If any person or persons keeping or using any such slaughtering house or place as aforesaid, shall at any time slaughter any horse, mare or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butcher's meat, or shall flay any horse, mare, gelding, foal, filly, ass, mule, bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle brought dead to such slaughtering house or other place, without taking out such licence, or without giving such notice as aforesaid, or shall slaughter, kill, or flay the same at any time or times other than and except within the hours hereinbefore limited, or shall not delay slaughtering or killing the same according to the direction of such inspector so authorised to prohibit the same as aforesaid, such person or persons so offending in either of the said cases, being thereof convicted, shall be adjudged, deemed, and taken to be guilty of felony, and shall be punished by fine and imprisonment, and such corporal punishment by public or private whipping, or shall be transported beyond the seas for any time not exceeding 7 years, as the Court before whom such offender or offenders shall be tried and convicted shall direct.

2. *Slaughtering of horses.*

26 Geo. 3, c. 71.

Persons slaughtering horses, &c., without licence, &c., guilty of felony.

Sect. 9. Reciting that divers ill-disposed persons keeping such slaughtering houses and places as aforesaid have, in order to prevent inquiry and detection, made a practice of throwing the hides of horses and other cattle into lime pits, or otherwise immersing in or rubbing the same with lime or some other corrosive matter; enacts, that if any person or persons keeping or using any such slaughtering house or place as aforesaid, shall throw into any lime pit or lime pits, or otherwise immerse in lime or any preparation thereof, or rub therewith or with any other corrosive matter, or destroy or bury the hide or hides, skin or skins of any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, by him, her, or there slaughtered, killed, or flayed, or shall be guilty of any offence against this act for which no punishment or penalty is expressly provided or declared, such person or persons, being convicted thereof, shall be adjudged, deemed, and taken to be guilty of a misdemeanor, and shall be punished by fine and imprisonment, and such corporal punishment, by public or private whipping, as the Court before whom such offender or offenders shall be tried and convicted shall direct.

Persons destroying hides, &c., to be deemed guilty of misdemeanors.

Sect. 10. If any person or persons so licensed as aforesaid shall make, or cause to be made, any false entry in any such book by him, her, or them to be kept as aforesaid, of any matter or matters, thing or things so required by him, her, or them to be made in such book as aforesaid, he, she, or they being convicted thereof, upon the oath of two credible witnesses, before any one justice of the peace for the county, riding, franchise, or district wherein such slaughtering house or place shall be situated (which said oath the said justice is hereby authorised and required to administer), shall, for every such offence, forfeit any sum not exceeding 20*l.* nor less than 10*l.*, to be levied by distress and sale of the goods and chattels of such offender or offenders, by warrant under the hand and seal of such justice (the surplus arising from such distress and sale, after the deduction of the charges thereof, to be restored), one moiety thereof to be paid to the informer, and the other moiety thereof to be forthwith paid or transmitted by the said justice to the overseers of the poor, or one of them, for the use of the poor of the parish wherein such offender or offenders shall reside; and in case such offender or offenders shall not have effects to the amount of the said penalty, it shall be lawful for such justice, after sale and application as aforesaid of such effects as shall be found, to commit him, her, or them to the house of correction, there to be confined to

Persons making false entries, liable to penalty, &c.

2. *Slaughtering of horses.* hard labour for any time not exceeding 3 months, nor less than 1 month.

26 Geo. 3, c. 71.

Form of conviction for.

Sect. 11. A conviction for any such offence in the tenor or to the effect following, shall be good to all intents and purposes:—

“Be it remembered, That on this — day of —, in the year 18—, A. B., licensed for slaughtering horses, is convicted upon the oaths of C. D. and E. F., two credible witnesses, before me, G. H., one of his Majesty’s justices of the peace for the county of —, of having wilfully made [or, “caused to be made,” as the case may be,] a false entry in the book required by the statute in that case made and provided to be kept by the said A. B., whereby he [“she” or “they”] has [or “have”] forfeited the sum of —. Given under my hand and seal the day and year above written.”

Inspector’s books to be produced at quarter sessions.

Sect. 12. The book and books of all and every the inspector and inspectors of every parish wherein any such slaughtering house or place shall stand or be situated, shall be produced at every general quarter sessions of the peace to be holden in and for the county wherein any such licence shall be granted, and delivered to the justices of the peace at such general quarter sessions assembled, then and there to be examined by them as they shall think fit.

Penalty on persons lending houses for purpose of slaughtering.

Sect. 13. If any person or persons shall occasionally lend any house, barn, stable, or other place, for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butcher’s meat without taking out such licence as aforesaid, and shall be thereof convicted before any justice of the peace for the county, riding, city, town, district, division, or liberty wherein such person or persons shall reside, upon the oath of two credible witnesses, he, she, or they shall forfeit, upon conviction, for every such offence, any sum not exceeding 20*l.*, nor less than 10*l.*; one moiety thereof to be paid to the informer, and the other moiety to the poor of the parish where the offence shall be committed; and which said last-mentioned moiety shall, upon payment thereof, be immediately transmitted by the justice so convicting to the overseers of the poor of the said parish, or one of them; and in case such penalty shall not be forthwith paid, such justice shall commit the offender to the common gaol or house of correction, there to remain without bail or mainprize for any time not exceeding three calendar months, nor less than one calendar month, unless the said penalty shall be sooner paid; and the form of such conviction shall be as follows, or to the like effect:—

Form of conviction.

“Be it remembered, That on this — day of —, A. B. was convicted, upon the oaths of two credible witnesses, before me, C. D., one of his Majesty’s justices of the peace for the county of —, for occasionally lending a house [or, “place,” as the case may be,] for the purpose of slaughtering horses [or, as the case may be, “of slaughtering cattle for other purposes than for butcher’s meat”] without a licence for that purpose first obtained, according to the statute in that case made and provided. Given under my hand and seal the day and year above written.”

Act not to extend to curriers, &c., killing distempered horses, &c.

Sect. 14. This act shall not extend to any currier, felt-maker, tanner, or dealer in hides, who shall kill any distempered or aged horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, or purchase any dead horse, mare, gelding, colt, filly, ass, mule, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, for the *bonâ fide* purpose of selling, using or curing the hide or hides thereof, in the course of their respective trades; nor to any farrier employed to kill aged and distempered cattle, nor to any person or persons who shall kill any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle of their own or other cattle, or purchasing any dead horse or other cattle to feed their own hounds or dogs, or giving away the flesh thereof for the like purpose.

Collar makers,

Sect. 15. If any collar-maker, currier, felt-maker, tanner or dealer

in hides, or farrier or other person, shall, under colour of their respective trades or occupations, knowingly or willingly kill any sound or useful horse, gelding, mare, foal, or filly, or boil or otherwise cure the flesh thereof for the purpose of selling the same, such collar-maker, and other tradesman or person shall be deemed and taken to be an offender within the meaning of this act, and shall, for every such offence, forfeit any sum not exceeding 20*l.*, nor less than 10*l.*

2. *Slaughtering of horses.*

26 Geo. 3, c. 71.
&c., killing sound horses, &c., liable to penalty.

Sect. 16. It shall and may be lawful for any justice of the peace before whom complaint shall be made for any offence against this act, to summon such person or persons, other than the party or parties complained against, as he shall think proper, to appear before him at a day certain, then and there to give evidence touching any offence committed against this act; and in case such person or persons shall wilfully refuse or neglect to attend or give evidence touching such offence, he, she, or they shall forfeit the sum of 10*l.*, and in default of payment thereof, or in case of inability to pay the same, shall stand committed to the common gaol or house of correction for any time not exceeding three calendar months, nor less than one calendar month, unless the said penalty shall be sooner paid.

Witnesses refusing to attend to forfeit 10*l.*

Sect. 17. Any inhabitant of the parish where any offence against this act shall be committed, shall, upon any complaint or hearing before any justice or justices of the peace, or upon any trial or examination by virtue of this act, be and be deemed to be, a competent witness, notwithstanding his or her contributing to any of the rates or dues to such parish, or being a poor person relieved or relievable by the said parish, and entitled as such, to receive any benefit or interest from any penalty or penalties to be paid or levied in pursuance of the directions of this act; any law or usage to the contrary notwithstanding.

Parishioners competent witnesses.

Sect. 18. If any person or persons shall at any time or times be sued, molested, or prosecuted for any thing by him, her, or them done or executed in pursuance of this act, or of any clause, matter, or thing herein contained, such person or persons may plead the general issue, and give the special matter in evidence for his, her, or their defence; and if, upon the trial, a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs shall become nonsuited, then such defendant or defendants shall have treble costs (*a*) awarded to him, her, or them, against such plaintiff or plaintiffs.

General issue.

Treble costs.

The 5 & 6 Will. 4, c. 59, ss. 7, 8, impose a penalty for slaughtering horses without a licence, and for not having a board placed over the entrance of slaughter houses as prescribed by the 26 Geo. 3, c. 71. It also requires horses to be slaughtered within three days after they are purchased for slaughtering, and in the mean time they must be provided with food. It also requires an entry to be made by the person receiving the horse. See the provisions in full, title, "*Cattle and Animals.*"

5 & 6 Will. 4, c. 59.
Further regulations as to slaughtering horses.

By the 7 & 8 Vict. c. 87, "An Act to amend the law for regulating

7 & 8 Vict. c. 87.

horses kept for slaughtering horses," it is enacted,
Sect. 1. That every licence granted under or by virtue of the 26 Geo. 3, authorising any person to keep or use any house or place for the purpose of slaughtering or killing any horse or other cattle (not killed for butcher's meat), shall be granted, and shall continue in force, for a period not exceeding one year from the date at which the same was granted, determinable as hereinafter provided: Provided nevertheless, that in the case of the renewal of any such licence to any person to whom any such licence may have been previously granted as aforesaid it shall not be necessary for such person to obtain or produce to the justices at such general quarter sessions of the peace a certificate under the hands and seals of the minister, churchwardens, overseers, or householders, as required by the said last-mentioned act.

New licences to be annual.]]

(a) But see now 5 & 6 Vict. c. 97, *ante*, p. 1281.

2. *Slaughtering of horses.*

7 & 8 Vict. c. 87.
Justices in quarter sessions may cancel licences.

Persons wantonly or cruelly ill-treating any horse to be liable to penalty.

Power for constables to enter licensed places.

Penalty for obstructing inspecting.

Penalty for inspector neglecting his duty.

Offences may be heard by two justices.

Penalties, how to be recovered and applied.

Sect. 2. And be it enacted, that it shall be lawful for the justices assembled at any general quarter sessions of the peace to be holden for any county, upon application and complaint made to them in writing by any person, and upon due proof being made to them that the party so complaining had given 14 days previous notice in writing thereof to the clerk of the peace for such county, and also to the party complained against, and upon due proof to their satisfaction that any person so licensed as aforesaid has been guilty of any breach or violation of the said two several hereinbefore recited acts or either of them, or of this act, or any part or parts thereof respectively, to cancel and wholly put an end to any and every licence which may have been granted to the person or persons so complained against, and from thenceforth the same shall be of no force or effect.

Sect. 3. And be it enacted, that if any such licensed or other person shall wantonly or cruelly beat, ill-treat, abuse, wound, or torture any horse or other cattle in any house, pound, stable, or other place in the occupation or use of such licensed person, every such person shall for every such offence, on conviction thereof, forfeit and pay a sum of money not exceeding 5*l*.

Sect. 4. And be it enacted, that it shall be lawful for any constable from time to time, and as often as he shall think fit, at all reasonable times in the daytime, by authority of this act, either alone or accompanied by any inspector appointed or to be appointed under the first-recited act, to enter upon and view and inspect all and every the houses, stables, sheds, yards, grounds, and premises for the keeping of which any such licence shall have been granted as aforesaid, and also to inspect or take an account of all or any of the horses or other cattle which shall from time to time be found upon such premises or any part thereof.

Sect. 5. And be it enacted, that in case any person to whom any such licence shall be granted as aforesaid, or any other person, shall at any time or in any manner obstruct, hinder, molest, or assault any such inspector whilst in the discharge of his duty, or the exercise of his power or authority under or by virtue of the said first-recited act or of this act, every such offender shall for every such offence, on conviction thereof, forfeit and pay such a sum of money, not exceeding 10*l*., as any two or more justices before whom such offender shall be brought shall deem fit.

Sect. 6. And be it enacted, that in case any such inspector shall at any time be guilty of any neglect or violation of the duty required of him by law, then and in every such case such inspector shall, upon conviction, forfeit and pay for every such offence a sum of money not exceeding 10*l*.

Sect. 7. And be it enacted, that all offences against this act, or any of the provisions thereof, shall and may be heard and determined before and by any two or more justices of the peace for the county within which the offence shall have been committed; and all penalties and forfeitures incurred thereby respectively shall and may be recoverable, with costs, before and awarded by any such justices, and shall be applied as follows; namely, such part as the justices shall think fit to the person who shall inform and prosecute for the same, and the remainder thereof to the sheriff or other proper officer of the county in which such conviction shall take place, for her Majesty's use, and shall be returned to the court of quarter sessions, under the provisions of 3 Geo. 4, c. 46, intituled "An Act for the more speedy return and levying of fines, penalties, and forfeitures, and recognisances estreated; and in case of nonpayment of any such penalty or forfeiture respectively it shall and may be lawful for such justices forthwith to commit the offender to the common gaol or prison within the jurisdiction of such justices for any time not exceeding 1 calendar month, as to such justices shall seem meet.

Sect. 8. And be it enacted, that the prosecution of every offence punishable under this act shall be commenced within 3 calendar months next after the commission of the offence, and not otherwise; and the evidence of the party complaining shall be admitted in proof of the offence.

3. *Horse-racing.*

7 & 8 Vict. c. 87.
Limitation as to
summary pro-
ceedings.

Sect. 9. And be it enacted, that any person who shall think himself aggrieved by any summary order or conviction made by any justice or justices of the peace under the authority of this act may appeal (a) to the justices of the peace at the next general or quarter sessions of the peace to be holden for the county wherein the cause of complaint shall have arisen, provided that such person at the time of the order or conviction, or within 48 hours thereafter, shall enter into a recognisance with 2 sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the justices at such sessions assembled, and to pay such costs as shall be by the last-mentioned justices awarded; and it shall be lawful for the justice or justices of the peace by whom such order or conviction shall have been made to bind over the witnesses who shall have been examined in sufficient recognisances to attend and be examined at the hearing of such appeal, and that every such witness, on producing a certificate of his being so bound under the hand of the justice or justices, shall be allowed compensation for his time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county, in like manner as in cases of misdemeanor, under the provisions of the 7 Geo. 4, c. 64, intituled "An Act for improving the administration of criminal justice in England;" and in case the appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the treasurer of the county by appellant.

Appeal to quartre
sessions.

Sect. 10. And be it enacted, that the words hereinafter mentioned, which in their usual signification have a more restricted or different meaning, shall in this act (except where the nature of the provisions or the context of the act shall exclude such construction) be interpreted as follows; (that is to say,) the word "county" shall include city, town, borough, cinque port, riding, liberty, or division; the word "horse" shall include mare, gelding, mule, pony, colt, or filly; the word "cattle" shall include bull, ox, cow, steer, heifer, calf, ass, sheep, lamb, goat, pig, or any other domestic animal; the word "constable" shall include headborough, peace officer, or police officer; and every word importing the singular number only shall extend and be applied to several persons and things as well as to one person or thing; and every word importing the masculine gender only shall extend to a female as well as a male.

Meaning of certain
words used in this
act.

III. Horse-Racing.

[18 Geo. 2, c. 34, s. 11; 3 & 4 Vict. c. 5.]

As to gaming in general, see *ante*, "*Gaming*." As to duty on race horses, see "*Race Horse*," under title "*Excise*."

The 13 Geo. 2, c. 19, intituled, "An act to restrain and prevent the excessive increase of horse-races, and for amending an act made in the last session of parliament, intituled, 'An act for the more effectual preventing of excessive and deceitful gaming,'" was repealed as to horse-racing by 3 & 4 Vict. c. 5, s. 1.

13 Geo. 2, c. 19.

The 18 Geo. 2, c. 34, s. 11, reciting the 13 Geo. 2, c. 19, ss. 3 & 5, "that the thirteen royal plates of one hundred guineas each, annually run for, as also the high prices that are constantly given for horses of

18 Geo. 2, c. 34,
s. 11, repeals 13
Geo. 2, c. 19, ss. 3
& 5.

(a) See the 12 & 13 Vict. c. 45, *ante*, given in certain cases; and see also p. 1283, as to notice of appeal to be tit. "*Appeal*."

3. *Horse-racing.*

18 Geo. 2, c. 34.

strength and size, are sufficient to encourage breeders to raise their cattle to the utmost size and strength possible;" enacts, That it shall and may be lawful for any person or persons to run any match, or to start and run for any plate, prize, sum of money, or other thing of the real and intrinsic value of 50*l.* or upwards, at any weights whatsoever, and at any place or places whatsoever, without incurring or being liable to the penalty or penalties in the said act, 13 Geo. 3, relating to weights as aforementioned, and in the same manner as might have been done if the said act had never been made, any thing herein contained to the contrary notwithstanding.

It has been settled that, since the repeal of 13 Geo. 2, c. 19, a horse-race for money, whether under or above 50*l.*, given by third persons by way of prize, is not illegal. (*Applegarth v. Colley*, 10 *M. & W.* 723.)

For the section of 8 & 9 Vict. c. 109, which relates to horse-racing, see that statute under title "*Gaming.*"

Where the defendant's mare having won a prize of 50*l.* at a horse-race, the conditions of which were that a subscription should be made up of 3 sovereigns each subscribed by the owners of the horses, and 30*l.* added, out of which the expenses and 1*l.* 10*s.* were to be deducted and 3*l.* 3*s.* to the owner of the second horse, it was held that such a race was legal within the 8 & 9 Vict. c. 109, and that the race satisfied the requirements of the statute. (*Crofton v. Colgate*, 10 *Ir. C. L. Rep.* 133. *C. P.*)

A trotting match at 25*l.* a side along a turnpike-road is not an illegal race within the 18th Geo. 2, c. 34, s. 11. (*Challand v. Bray*, 1 Dowl. N. S. 783.) Therefore, if, in conformity with the terms of such a wager, a deposit has been made with a stakeholder, and such deposit becomes forfeited by either of the parties under the conditions of the wager, the party so forfeiting cannot recover back the amount of the deposit from a stakeholder. (*Ib.*)

So, a steeple-chase for 50*l.* or upwards is a lawful race within that act, notwithstanding the above repeal of the provisions in the 13 Geo. 2, as to horse-racing. (*Evans v. Pratt*, 4 *Scott, N. R.* 378.)

In that case it was decided, that, where the race is between two or more horses, which start from a certain place to go to a certain goal, and the object of the race is, *bonâ fide*, to test the spirit, and strength, and vigour of the horses as compared one with another, the court will hold the race legal, though it be not run upon a level ground, coming within the denomination "*The Turf.*" The following is the judgment of Mr. Justice *Maule* in that case:—"The acts of Parliament which apply to this subject have been considered with reference to the cases and the principles of construction applied to them, and on those principles, I think that this race is to be considered to be a legal race within the meaning of the legislature. The acts which made horse-racing illegal were the 16 Car. 2, c. 7, and the 9 Ann. c. 14(a), which provided certain things with regard to certain kinds of racing, combined with other matters. Then came the 13 Geo. 2, c. 19, the effect of which was to prohibit the starting of horses for races unless they carried certain proportionate weights, and at other places than at Newmarket, in the county of Cambridge, and at Black Hambleton, in the county of York, or otherwise than for prizes of the value of 50*l.* and upwards. The next statute, affecting this question, is the 18 Geo. 2, c. 34, and the legality which is therein conferred upon horse-racing does not depend upon implication, but upon the express terms which are employed in the 11th section; and I think that it cannot be doubted that the words of that section relieved those races, which in express terms it is said it shall be lawful for any person or persons to run, not only from the penalties prescribed by the statute of 13 Geo. 2, c. 19, but from any illegality which might apply to them

(a) These acts are now repealed by 8 & 9 Vict. c. 109, s. 15.

under the former law. Then this 11th section is to be construed 3. Horse-racing. thus:—it shall be lawful for any person to run any match for 50*l.* or more at any place whatever, without incurring the penalties under the 13 Geo. 2, c. 19, or any other illegality. Supposing this to be so expressed, the act of the 3 & 4 Vict. c. 5, which repeals the 13 Geo. 2, c. 19, confines itself to striking off the roll of Parliament that part of that statute which relates to horse-racing, and then there will be still standing the 11th section of the 18 Geo. 2, c. 34, to be read and construed in the manner in which I have read it. The only question then is, whether that section applies to this particular transaction. It is a section, it is to be observed, which relieves parties from penalties, and should be liberally construed, and the object of the legislature being to procure a supply of a strong and powerful breed of horses, and it being consistent with the spirit of the statute of 3 & 4 Vict. c. 5, I think that this was a race calculated to produce that end, and within the meaning of that section. The only doubt raised upon that point was upon the language held by Lord *Eldon*, in *Whaley v. Pajot*. That learned Judge referred to a kind of racing which is called “running on the turf,” as being that which was intended to be within the operation of the statute. I do not know what that may be, but I should say that it must be running on the surface of the earth from point to point, the horses starting at the same time, and running from and to the same places. We cannot very well take judicial notice of what a regular racecourse is, and if you choose to run over a fallow field, and call one man clerk of the course, and another the judge, I do not know why it may not be a regular course as well as any other.”

A match for 25*l. per side* was held a match for 50*l.* within the 13 Geo. 2. (*Belmead v. Gale*, 4 Burr. 2432.)

A wager, before the 3 & 4 Vict. c. 5, that a single horse should run on the high road from A. to B., and should perform that distance in a shorter time than two horses placed, one at A. and the other at any distance on the road the owner should please, was held a race not legalised by the 13 Geo. 2, or 18 Geo. 2, which were intended only to legalise *bond fide* races on the turf; and that, though the wager was above 50*l.*, it could not be sued on. (*Whaley v. Pajot*, 2 B. & P. 51.) So, a wager that the plaintiff could not perform a certain journey in a postchaise with a pair of horses in a given time was held bad. (*Ximenes v. Jaques*, 6 T. R. 499.)

It was held before the 3 & 4 Vict. c. 5, that no action would lie to recover a wager betted on a race to be run for a smaller stake than 50*l.* (*Johnson v. Bann*, 4 T. R. 1.)

A wager of 50*l.* to 1*l.*, that a certain horse had not won a by-gone horse race, is lawful and may be recovered. (*Pugh v. Jenkins*, 1 Q. B. 631.)

A race was run, subject to certain conditions, one of which was, that the riders should be “gentlemen, farmers, or tradesmen, being persons never having ridden as regular jockeys or paid riders;” another, that the decision of the committee on any dispute that might arise should be final. At the trial, it appeared that the rider of the plaintiff’s horse, which came first to the winning-post, had been in the habit of riding at the races, sometimes receiving his expenses, but never having been paid for his services; and that the plaintiff’s right to the stakes was disputed on the ground of an alleged cross, on the subject of which the committee had heard evidence, and intimated an opinion adverse to the plaintiff, but had come to no final decision:—Held, that the rider of the plaintiff’s horse was not disqualified, nor the plaintiff, under the circumstances, disentitled to maintain the action. (*Walmsley v. Matthews*, 3 Scott, N. R. 584.)

In an action on the following memorandum, duly signed by the respective parties:—“Evans and Pratt; T. Holyoake, Esq., umpire. F. Pratt bets T. Evans 100*l.* to 25*l.*, p. p., Mr. Ryley’s brown mare (late his property) beats T. Evans’ mare, Matilda, four miles across a

3. *Horse-racing.* country, 13 s. each. To come off the 1st March, 1841. The umpire's decision to be final."—Held, that evidence was admissible to show that, in sporting phraseology, "across a country" means over all obstructions, and prohibited the rider from availing himself of an open gate. (*Evans v. Pratt*, 4 *Scott*, N. R. 378.)

It was held also in that case, that it was not competent to either party to dispute the decision of the umpire, whom they had constituted judge of the law and the fact. (*Ib.*)

Stewards of horse races are not in the strict legal position of judges or arbitrators, and where there are more than one it is not necessary, to make their decision valid, that it should have been arrived at jointly, it need only be fair and final. (*Parr v. Winteringham*, E. & E. 394.)

Where the rules of certain races provided that all disputes should be settled by the stewards, and two stewards had been named, one of whom, on a dispute arising as to which horse was entitled to the stakes of a race, gave his opinion, in writing, that the plaintiff was entitled to them: it was held, that the plaintiff could not recover the stakes on the award of that steward alone, although it appeared that the other steward had stated that he would acquiesce in whatever his colleague did. To make the sole award of the latter available, it must be clearly shown that both the disputing parties, and the stakeholder also, submitted to his sole authority. (*Marryat v. Broderick*, 2 *M. & W.* 369.)

It seems that a party subscribing to a legal horse race cannot recover his stake from the stakeholder, after the race has been run, and before the stakeholder has paid over the money. (*Ib.*) At all events, he cannot recover it unless he demand it before the race was run. (*Ib.*)

The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." It appeared that the Newmarket meetings were meetings of a coursing club; and the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules; and that the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting, but if the weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd of February, 1841. On Wednesday, the 3rd, the plaintiff and the defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday the 9th, and again, from the same cause to Tuesday the 16th, when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default:—Held, first, that the true construction of the contract was, that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and therefore that the plaintiff performed his part of the contract by being ready to run on Wednesday the 17th. (*Daintree v. Hutchinson*, 10 *M. & W.* 85.)

It was also held in that case, secondly, that the plaintiff was not bound to produce the printed rules, but it was enough for him to show that the February meeting was then actually held. (*Ib.*)

It was also held, that evidence was admissible to show the meaning of the words "P. P." subjoined to the agreement. (*Ib.*)

In a case before the 3 & 4 Vict. c. 5, where, by the terms of a horse race, the entrance money was to be given to the second best horse, and it was doubtful, on the wording of those terms, whether all the money paid at the entering each horse was to be considered as entrance money, the Court put such a construction on the terms as included the whole in the description of entrance money to be given to the second best horse, being most agreeable to the 13 Geo. 2, c. 19, ss. 2, 7. (*Dowson v. Scriven*, 1 *H. Bl.* 218.)

Hosiery.

See "*Servants.*"

BY 8 & 9 Vict. c. 77, reciting 3 Geo. 4, c. 96, it is enacted (s. 1), "that from and after January 1st, 1846, when any manufacturer of hosiery, or the agent of any such manufacturer, gives out to a workman the materials to be wrought, such manufacturer or agent shall at the same time deliver to such workman a printed or written ticket, signed by such manufacturer, containing the particulars of the agreement between such manufacturer and such workman, as in the schedule to this act annexed; and such manufacturer or agent delivering such ticket shall make or cause to be made, and shall preserve until the work contracted to be done shall have been completed or paid for, a duplicate of such note or ticket.

Sect. 2. That in the event of any dispute between the manufacturer or his agent and the workman, such ticket, and the said duplicate thereof, shall be required to be produced, and shall, together or either of them, be evidence of all things mentioned therein or respecting the same.

Sect. 3. That where the subject of disputes relates to the alleged improper or imperfect execution of any work delivered to a manufacturer or his agent, such piece of work shall be produced in order to adjudication, or if not produced shall be deemed and taken to have been sufficiently and properly executed.

Sect. 4. That if any manufacturer or agent shall neglect or refuse to deliver such ticket to such workman as aforesaid with the materials so given out, and if such workman shall complain thereof to any justice of the peace having jurisdiction in the place where the materials shall have been delivered out or where the workman shall reside, such justice may summon such manufacturer or agent to attend before two justices at a time or place appointed for hearing the complaint, and set forth in the summons; and if the person to whom such summons so directed appears according to the tenor thereof, or if he does not appear, and the due service of the summons is proved, the said justices may proceed to hear and determine the complaint: and if such neglect or refusal as aforesaid be proved, either by the confession of the party complained against, or by the oath of the complainant or of any other credible witness or witnesses, such justices may convict such offender, and may upon such conviction adjudge him to pay such penalty not exceeding 5*l.*, together with the costs attending the conviction, as such justices shall think fit, and the party so adjudged to pay such penalty and costs shall pay the same accordingly: provided always, that in all convictions of adjudications under this act one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation or employment to which this act extends, and shall not be the father, son, or brother of any such person.

Sect. 5. That if any of the parties to the said complaint shall make oath before any justice having cognizance of such complaint that he or she believes that the attendance of any person as a witness will be material to the hearing of such complaint, such justice may summon such person, having been paid or tendered a reasonable sum for his expenses, to appear and give evidence on oath at a time and place set forth in the said summons; and if any person so summoned shall not appear at the time and place set forth in the said summons, and shall not make excuse for the default to the satisfaction of the justices there present, and if the due service of the summons be proved, or if such person appearing according to the summons shall not submit to be examined as a witness, then such justices may adjudge such person

Hosiery.

3 Geo. 4, c. 96.
Manufacturer to deliver with materials a ticket of work.

Ticket to be evidence.

When dispute arises as to imperfect execution the work to be produced.

Penalty on manufacturer for non-delivery of ticket.

See now 11 & 1 Vict. c. 43.

Power of summoning witnesses.

Hosiery.

8 & 9 Vict. c. 77.

Service of summons.

Levying and application of penalty.

No certiorari allowed, nor distress unlawful for want of form.

Interpretation of act.

so making default in appearing or refusing to give evidence to pay such penalty not exceeding 2*l*. as such justices shall think fit, and the party so adjudged to pay such penalty shall pay the same accordingly.

Sect. 6. That every summons required by this act shall be served by delivering the same to the person summoned, or by leaving the same at his or her usual place of abode, 24 hours at least before the time appointed by the summons for such person to appear.

Sect. 7. That if any such penalty or costs so adjudged by any justices to be paid is not paid immediately upon adjudication, such justices may issue their warrant to distrain and sell the goods and chattels of the person so adjudged to pay the same, for the amount thereof, with costs; and the proceeds of such distress, after paying the penalty and costs, and the costs of such distress and sale, shall be paid over to the person convicted; and the said penalty shall be paid over to the sheriff or other proper officer of the county, city, borough, or place in which such conviction shall take place, for her Majesty's use, and shall be returned to the court of quarter sessions, under the provisions of 3 Geo. 4, c. 46.

Sect. 8. That no order or conviction, or proceeding touching the same respectively, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of her Majesty's superior courts of record; and that when any distress shall have been made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any defect or want of form in the summons, warrant, conviction, warrant of distress or other proceedings in relation thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for special damage (if any) by action on the case.

Sect. 9. That the word "manufacturer" in this act shall be understood to mean any person furnishing the materials of work to be wrought into hosiery goods, to be sold or disposed of on his own account, and the word "agent" to include any person conveying or delivering the same to the workman, and the word "workman" any person actually employed in the manufacture of the same.

SCHEDULE.

If the material to be manufactured be into stockings :—

Gauge	Dumps or clocks
Ribbed or plain	Bound heels or toes
What kind of material	Wrought heels or cut
Size	Wrought feet or cut
Jacks in width	Turnings in leg
Mark	Wetted or not
Length of leg	Weight per dozen
Length of foot	Price per dozen pair of making legs
Narrowings in leg	Price per dozen pair of making feet
Narrowings in heel	Name of party putting out the work
Narrowings in gusset	Name of artificer
Narrowings in toe	

If the material to be manufactured be into socks :—

Gauge	Narrowings in heel
Ribbed or plain	Narrowings in gusset
What kind of material	Narrowings in toe
Size	Cut or wrought heels
Jacks in width	Cut or wrought feet
Mark	Price per dozen pair
Length of leg with top	Name of party putting out the work
Length of foot	Name of artificer

If the material to be manufactured be into gloves :—

Hosiery.

8 & 9 Vict. c. 77.

Gauge	What kind of welts
Ribbed or plain	Plaited or not
What kind of material	What figure in back of hand
Size	Weight per dozen
Jacks in width of hand	Price per dozen pair of making hands
Jacks in width of finger	Price per dozen pair of making fingers
Mark	Name of party putting out the work
Length of hand	Name of artificer
Length of finger	

If the material to be manufactured be into shirts :—

Gauge	Length of sleeve
Ribbed or plain	Fashioned or not
What kind of material	Wetted or not
Size	Weight per dozen
Jacks in width of body	Price per dozen of making bodies
Jacks in width of sleeve	Price per dozen pair of making sleeves
Mark	Name of party putting out the work
Length of body	Name of artificer

If the material to be manufactured be into caps :—

Gauged	Striped or plain
Ribbed or plain	Weight per dozen
Material	Price per dozen
Jacks in width	Name of party putting out the work
Fashion	Name of artificer

If the material to be manufactured be into any other description of hosiery :—

Gauge	Price
Length	Fashion
Width	Name of party putting out the work
Weight	Name of artificer

See "*Framework Knitters.*"

House.

As to the taxes on, see "*Taxes.*"

As to burglary in, see "*Burglary.*"

As to stealing in, see *post*, "*Larceny.*"

As to arson of, see "*Burning.*"

As to nuisances to, see "*Nuisance.*"

As to malicious injuries to houses and property in general, see "*Malicious Injury to Property.*"

A man's home or habitation is so far protected by the law, that if any person attempt to break open a house in the night time, and is killed in such attempt, the slayer shall be acquitted and discharged. And so tender is the law in respect of the immunity of a man's house, that it will never suffer it to be violated with impunity. Hence in part arises the animadversion of the law upon eaves-droppers, nuisances, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. (4 *Black. Com.* 223.)

Concerning the breaking open the doors of a house in the execution of process and for other purposes, see "*Warrant.*"

As to breaking them open to make a distress, see "*Distress.*"

Hue and Cry.

Hue and Cry. **LORD COKE** saith, that hue and cry (called in ancient records *hutesium et clamor*) do mean the same thing; for that *huer* in *French* is to hoot or shout, in *English* to cry. (2 *Inst.* 173; 3 *Id.* 116.) But since it appeareth by the old books (of which also *Lord Coke* maketh observation, 2 *Inst.* 173), that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous, but that this *hutesium*, or *hooting*, is by the horn, and *crying* by the voice; which also accordeth with the *French* word *hutchet*, which signifieth a huntsman's horn; so that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry, is said to be practised also in Scotland. And this blowing of a horn by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time; for, amongst the laws of *Widred*, king of *Kent*, in the year 696, this is one, that, "if a stranger go out of the road, and neither shout nor blow a horn, he shall be taken for a thief."

Hue and cry,
what.

Hue and cry is the old common-law process after felons, and such as have dangerously wounded any person; and this hath received great countenance and authority by several acts of Parliament. (2 *Hale*, 298.) Though most of such acts are now repealed by the 7 & 8 *Geo.* 4, c. 27, this process may still be adopted.

Application to the
constable.

When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night, the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he know the name of him that did it, he must tell the constable the same. 3. If he know it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony, is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected as being persons vagrant in the same night; for many circumstances may, *ex post facto*, be useful for discovering a malefactor, which cannot be at first found. (2 *Hale*, 100, 101; 3 *Inst.* 116.)

Justice's warrant
for.

For levying hue and cry, although it is a good course to have the warrant of a justice of the peace, when time will permit, in order to prevent causeless hue and cry; yet this seems by no means necessary, nor is it always convenient; for the felon may escape before the warrant be obtained, and hue and cry was part of the law before justices of the peace were first instituted. (2 *Hale*, 99.)

Constable to raise
the town,

The duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender. (3 *Inst.* 116.)

and to search.

And, upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felons. (2 *Hale*, 103.)

Breaking doors to
search.

But though he may search suspected places or houses, yet his entry

must be by the doors being open; for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there; and then it is true he may; therefore, in case of such search, the breaking open the door is at peril: namely, justifiable, if he be there; not justifiable, if he be not there. But it must be always remembered, that, in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. (2 *Hale*, 103; 2 *Hawk*. c. 14, s. 1. See "*Warrant*.")

Hue and Cry.

If the person against whom the hue and cry is raised be not found in the constableness, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the sea-side. And this was the law before the conquest. (3 *Inst.* 116.)

Notice to the next constable,

And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to one next town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. (*Dalt.* c. 54.)

and to the next.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described. (2 *Hale*, 103.)

What shall be done where the person cannot be described.

And therefore in this case all that can be done is, for those that pursue the hue and cry, to take such persons as they have probable cause to suspect, as, for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they have been, and the like. (2 *Hale*, 103.)

By stat. 3 Edw. 1, c. 9, all shall be ready, and appareled, at the commandment and summons of sheriffs (or constables, 2 *Inst.* 171), and at the cry of the county, to sue and arrest felons, on pain of a grievous fine. And if default be found in the lord of the franchise, the king shall take the franchise to himself; and if in the sheriff or other officer, they shall have one year's imprisonment, and shall make a grievous fine.

All persons shall follow the hue and cry.

And the life of hue and cry is fresh suit. (3 *Inst.* 117.)

If the person pursued by hue and cry be in a house, and the doors are shut and refused to be opened on demand of the constable and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only a suspicion of felony; for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case. And the same law is, upon a dangerous wound given, and a hue and cry levied upon the offender. (2 *Hale*, 102; see "*Warrant*.")

Breaking doors to arrest upon pursuit.

And it seems in this case, that, if he cannot be otherwise taken, he may be killed; and the necessity excuseth the constable. (2 *Hale*, 102.)

Killing in the pursuit.

If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables and those that follow the hue and cry may arrest and imprison him in the common gaol, or carry him to a justice of the peace, to be examined as to where he was at the time of the felony committed, and the like. (2 *Hale*, 102.)

Arresting an innocent person.

If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, and the like, yet the hue

Arresting a person by description.

Hue and Cry.

Arresting upon
hue and cry levied
without cause.

and cry doth justify the constable, or other persons following it, in apprehending the person so described, whether innocent or guilty: for that is his warrant; it is a kind of process that the law allows of, not usual in other cases, namely, to arrest a person by description. (2 *Hale*, 103.)

In case of hue and cry once raised and levied, on supposal of a felony committed, though in truth there was no felony committed, yet those that pursue hue and cry may arrest and proceed as if so be a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person (especially a constable) upon hue and cry levied, do extremely differ; for, in the former case, there must be a felony averred to be done, and it is issuable; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information were false.

And the reasons hereof are these—1. Because the constable cannot examine the truth or falsehood of the suggestion of him that first levied it, for he cannot administer to him an oath; and if he should forbear his pursuit of the hue and cry till it be examined by a justice of the peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is, by the 3 *Edw.* 1, c. 9, and was by other acts now repealed, compellable to pursue hue and cry, and he is punishable, and so are those of the vill, if they do it not. 3. Because he that first raiseth a hue and cry, where no felony is committed, that is, he who giveth the false information, is severely punishable by fine and imprisonment if the information be false.

And therefore, if he raise hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person; and the raiser is punishable: and by the same reason, if he give notice of a felony committed, where there was in truth none.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1. In respect that it is upon the hue and cry, there needs no averment that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry; or if the arrest were made by that constable, or those vills to whom the hue and cry came at the second hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done. 2. But also, inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person is left to the suspicion and discretion of the constable, or of the people of the second or third vill, he that arrests any person upon such general hue and cry must aver that he suspected, and show a reasonable cause of suspicion.

But now, by stat. 7 *Jac.* 1, c. 5, the constable, or any that come to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but as his deputies or assistants within the precincts of their constableness. (2 *Hale*, 101 to 104.)

It seems that they who are taken upon fresh hue and cry are not bailable, as being to be accounted amongst those persons who are under a violent presumption of guilt. (2 *Hawk.* c. 15, s. 41.)

And they which levy not hue and cry, or pursue not upon hue and cry; may be indicted, fined, and imprisoned. (3 *Inst.* 117; 3 *Edw.* 1, c. 2.)

And it is an article of the leet to inquire of hues and cries levied and not pursued. (18 *Edw.* 2.)

Persons taken on
hue and cry, how
far bailable.

Punishment of
those who follow
not hue and cry.

Form.

Westmoreland, } To all constables, and other officers, as well in the said county
to wit. } of [Westmoreland] as elsewhere, to whom the execution
hereof doth or shall belong.

Warrant to levy
hue and cry on a
robbery having
been committed.

Whereas, A. I., of in the county of , yeoman, hath this day made information upon oath before me, J. P., esquire, one of her Majesty's justices of the peace in and for the said county of W., that on this present day of , in the year of the reign of , betwixt the hours of three and four in the afternoon of the same day, at a place called , in the said county of W., in the Queen's highway there, two malefactors, and felons to him the said A. I., unknown, in and upon him the said A. I., then and there being in the peace of God and of our lady the Queen, feloniously did make an assault, and him the said A. I. then and there feloniously did put in great fear and danger of his life, and the sum of , of lawful money of Great Britain, of the goods and chattels of him the said A. I., from the person and against the will of him the said A. I., then and there violently and feloniously did steal, take, and carry away; and that one of the said malefactors and felons to him the said A. I. unknown, is a tall, strong man, and seemeth to be about the age of years, is pitted in the face with the small-pox, and hath the scar of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay gelding with a star on his forehead; and the other, &c. And that after the said felony and robbery committed, they the said malefactors and felons, to him the said A. I., unknown, did fly and withdraw themselves to places unknown, and are not yet apprehended: These are therefore to command you forthwith to raise the power of the towns within your several precincts, and to make diligent search therein for the persons above described, and to make fresh pursuit and hue and cry after them from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice thereof in writing, describing in such notice the persons and the offence aforesaid, unto every next constable on every side, until they shall come to the sea shore, or until the said malefactors and felons shall be apprehended; and all persons whom you or any of you shall, as well upon such search and pursuit as otherwise, apprehend, or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith before some one of her said Majesty's justices of the peace in and for the county where he or they shall be so apprehended, to be by such justice examined, and dealt withal according to law. And hereof fail you not respectively, upon the peril that shall ensue thereon. Given under my hand and seal, in the said county of W., the day of aforesaid, in the year aforesaid.

Hundred.

IN ancient times, before the conquest, it was ordained, for the more sure keeping of the peace, that all free-born men should cast themselves into several companies, by ten in each company; and that every of those ten men should be surety and pledge for the forthcoming of his fellows. For which cause, these companies in some places were called *Tithings*, as containing the number of ten men with their families: and even as ten times ten do make an hundred, so because it was then also appointed that ten of these companies should at certain times meet together for their matters of greater weight, therefore that general assembly was, and yet is, called an *Hundred*. (*Lamb. Const.* p. 6.)

If any homicide be committed, or dangerous wound given in the daytime, and the offender escape, the town shall be amerced; and if out of the town, the hundred shall be amerced. (2 *Hawk.* c. 12, s. 2. See "*Escape*,")

The statute now in force, by which hundreds are liable for damages,

Hundred, whence
so called.

Tithings.

Hundred to be
amerced for an
escape.

Liability of.

Liability of hundred for damages.

7 & 8 Geo. 4, c. 31. Hundred to make compensation for damage done by rioters in certain cases.

is the 7 & 8 Geo. 4, c. 31; the 7 & 8 Geo. 4, c. 27, repealing all the prior statutes relative to such liability.

By such repeal, it seems that the hundred are no longer liable in cases of robbery, arson, killing or maiming cattle, cutting down or destroying trees, destroying turnpikes or works on navigable rivers, cutting hop binds, destroying corn to prevent it being exported, destroying corn going to market, or injuring the horses or carriages so conveying it, and wounding revenue officers; and it seems that the hundred is now only liable for damage done by rioters.

By the 7 & 8 Geo. 4, c. 31, if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof [extended by 2 & 3 Will. 4, c. 72, to threshing machines], or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine (a), or any bridge, waggon way, or trunk for conveying minerals from any mine, shall be *feloniously* (b) demolished, pulled down, or destroyed, *wholly or in part*, by any persons *riotously and tumultuously* (c) assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred (d), by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation (e) to the

(a) The lessees of a mine constructed a wooden trough, by means of which water was conveyed from a distance to a pool half a mile distant from their mine, being as near as the nature of the ground would admit of. The water so brought was used for the purpose of washing the ore obtained from the mine. It was held, that this was an "erection used in conducting the business" of the plaintiffs' mine within the meaning of the 7 & 8 Geo. 4, c. 31, s. 2. And the lessee recovered against the hundred for its felonious destruction. (*Barwell v. Hundred of Winterstoke*, 19 L. J. 206, Q. B.)

(b) To bring a case therefore within the act, the injury must be done by persons *riotously* assembled together in a manner which will constitute a riot (as to which see title "*Riot*," Vol. IV.), and *feloniously* within the meaning of the 7 & 8 Geo. 4, c. 30, s. 8 (as to which see "*Malicious Injuries to Property*,") (See *Reid v. Clarke*, 7 T. R. 496; *R. v. Thomas*, 4 C. & P. 237.)

(c) As to what is a riotous assembly, see title "*Riot*."

(d) By s. 7, *post*, the required sum or sums of money are to be raised upon the hundred against which such actions shall have been brought, over and above the general rate to be paid

by such hundred in common with the rest of the county. Sect. 12 provides for cases where the offence is committed in a place which does not contribute to the county rate at all, or contributes thereto, but not as being part of any hundred. By the 5 & 6 Will. 4, c. 76, s. 112, boroughs to which courts of session of the peace are given are not to contribute at all to the county rate except as therein-after provided. By s. 113, boroughs are to pay the expenses of prosecutions at the assizes for offences within the borough; and, by s. 117, they are also to pay a proportion of other county expenses. In an action against the hundred of Salford to recover compensation for injury done by a riotous mob to premises within the borough of Manchester, which formed part of the hundred of Salford:—Held, that the action was properly brought against the hundred, and that the borough was liable as part of the hundred, although it came within the provisions of the 5 & 6 Will. c. 76, s. 112. (*Birley v. Salford Hundred*, 11 M. & W. 391.)

(e) Semble, in assessing compensation for the demolition of a dwelling-house, under 7 & 8 Geo. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury, and replace the building in the state it

person or persons damnified (a) by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders, to any fixture, furniture, or goods whatever (b) in any such church, chapel, house, or other of the buildings or erections aforesaid.

Sect. 3. No action or summary proceeding, as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged (c), shall, within 7 days (d) after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders if known, and shall submit to the examination of such justice touching the circumstances of the offence (e), and become bound by recognizance before him to prosecute the offenders when apprehended: Provided also that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence (f).

Sect. 4. No process for appearance in any action to be brought by virtue of this act against any hundred or other like district, shall be served on any inhabitant thereof, except on the high constable or some one of the high constables (if there be more than one), who shall,

Liability of.

7 & 8 Geo. 4, c. 31.

Party damnified to comply with certain conditions.

Limitation of time for actions.

Process against hundred to be served on high constable, who may defend, or let judgment go by default, as advised.

was in when the outrage was committed, and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. (*Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 273.)

(a) A reversioner may sue. (*Pellew v. Wonford*, 9 B. & C. 135.)

(b) Mr. Roscoe in his work on Evid. 10th ed. p. 812, has the following observations on this part of the statute:—"Neither the Riot nor the Black Act contained any express provision of this kind. Yet where the injury done to personal property was the immediate effect of the act of demolition, or if the destruction of furniture, &c., and demolition of the building, were parts of the same riotous transaction, and done at the same time, the plaintiff was allowed to include the whole in his damages. (*Hyde v. Cogan*, Dougl. 669.) So, where in pulling down a house damage was done to the garden appurtenant. (*Wilmot v. Horton*, Id. 701, n.) So, where rioters broke into a flour-seller's house and damaged the flour, in the course of demolishing the house. (*Greasley v. Higginbottom*, 1 East, 636.) But where a distinct and substantive offence was committed by some of the mob, as where the flour (in the last case) was stolen or compulsorily parted with by the dealer at an under price; or where money, plate, &c., were missing after the riot; (*Smith v. Bolton*, Holt, N.

P. 201); or where the mob broke into a gunmaker's and carried away the arms for their own use. (*Beckwith v. Wood*, 1 B. & Ald. 487.) In these cases the hundred was held not liable. And such, it is apprehended, still continues to be the law, notwithstanding the words of additional liability inserted in the present act."

(c) If no servant of a reversioner, who may sue, has the care of the premises, the reversioner is the proper person to give in his examination. (*Pellew v. Wonford*, 9 B. & C. 135.)

(d) It seems the days are exclusive of the day of the offence. (*Id.*)

(e) The party is not bound to state his suspicions as to the offender. (*Id.*)

(f) The premises of A., a termor, having been burnt by a riotous assembly, A. complied with all the requisites of stat. 7 & 8 Geo. 4, c. 31, and commenced an action against the inhabitants of the city and county within three months from the offence; before verdict or judgment, and after the expiration of the three months, A. died. His executrix commenced an action against the inhabitants on the seventh day from A.'s death. Held, that, supposing an executrix entitled to sue in any such case (as to which the Court gave no opinion), the action having been commenced more than three months from the offence, was too late under the provision in sect. 3. (*Adam v. Inhabitants of Bristol*, 2 A. & E. 389.)

Liability of.

7 & 8 Geo. 4, c. 31.

If plaintiff recovers, the sheriff, on receipt of writ of execution, shall make out a warrant directing treasurer of county to pay the amount.

Mode of reimbursing high constable for expenses in defending action, &c.

Reimbursing county treasurer.

Mode of proceeding in cases where the damage does not exceed 30l.

within 7 days after such service, give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for the hundred or district; and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action; but if such person shall die before such termination, the succeeding high constable shall act in his stead.

Sect. 6. Wherever the plaintiff in any such action shall recover judgment, whether after verdict or by default or otherwise, no writ of execution shall be executed on any inhabitant of the hundred or other like district, nor on such high constable; but the sheriff, upon the receipt of the writ of execution, shall (on payment of the fee of 5s. and no more) make his warrant to the treasurer of the county, riding, or division, in which such hundred or other like district shall be situate, commanding him to pay to the plaintiff the sum by the said writ directed to be levied; and such treasurer is hereby required to pay the same, as also any other sum ordered to be paid by him by virtue of this act, out of any public money which shall then be in his hands, or shall come into his hands before the next general or quarter sessions of the peace for the said county, riding, or division; and if there be not sufficient money for that purpose before such sessions, he shall give notice thereof to the justices of the peace at such sessions, who shall proceed in the manner hereinafter mentioned.

Sect. 7. For the purpose of indemnifying the high constable and the county treasurer, enacts, that if such high constable of the hundred or other district sued, shall produce and prove before any 2 justices of the peace of the county, riding, or division, residing in or acting for such hundred or district, an account of the just and necessary expenses which he shall have incurred in consequence of any such action as aforesaid, such justices shall make an order for the payment thereof upon the treasurer of the county, riding, or division in which such hundred or district shall be situate; and if in any such action judgment shall be given against the plaintiff, the high constable shall in like manner be reimbursed for the just and necessary expenses by him incurred in consequence of such action, over and above the taxed costs to be paid by the plaintiff in such case; and if it shall be proved to any 2 such justices that the plaintiff in the action is insolvent, so that the high constable can have no relief as to such taxed costs, such justices shall make an order upon the treasurer of the county, riding, or division as aforesaid, for the payment of the amount of such taxed costs; and the justices of the peace at the next general or quarter sessions of the peace, to be holden for any such county, riding, or division, or any adjournment thereof, shall direct such sum or sums of money as shall have been paid or ordered to be paid by the treasurer by virtue of any such warrant or order as hereinbefore mentioned, to be raised on the hundred or other like district, against the inhabitants of which any such action shall have been brought, over and above the general rate to be paid by such hundred or district in common with the rest of the county, riding, or division, under the acts relating to county rates; and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer.

Sect. 8. And whereas it is expedient to provide a summary mode of proceeding where the damage is of small amount; be it therefore

enacted, that it shall not be lawful for any person to commence any action against the inhabitants of any hundred or other like district, where the damage alleged to have been sustained by reason of any of the offences in this act mentioned shall not exceed the sum of 30*l.*, but the party damnified shall, within 7 days after the commission of the offence, give a notice in writing of his claim for compensation, according to the form in the schedule hereunto annexed, to the high constable, or some one of the high constables (if there be more than one) of the hundred or other like district in which the offence shall have been committed; and such high constable shall, within 7 days after the receipt of the notice, exhibit the same to some 2 justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for such hundred or district, and they shall thereupon appoint a special petty session of all the justices of the peace of the county, riding, or division, acting for such hundred or district, to be holden within not less than 20 nor more than 30 days next after the exhibition of such notice, for the purpose of hearing and determining any claim which may be then and there brought before them on account of any such damage; and such high constable shall, within 3 days after such appointment, give notice in writing to the claimant, of the day and hour and place appointed for holding such petty session, and shall within 10 days give the like notice to all such justices acting for such hundred or district; and the claimant is hereby required to cause a notice in writing, in the form in the schedule hereunto annexed, to be placed on the church or chapel-door, or other conspicuous part of the parish, township, or place in which such damage shall have been sustained, on two Sundays preceding the day of holding such petty session (a).

Sect. 9. It shall be lawful for the justices, not being less than two, at such petty session, or any adjournment thereof, to hear and examine, upon oath or affirmation, the claimant, and any of the inhabitants of the hundred or other like district, and their several witnesses, concerning any such offence, and the damage sustained thereby; and thereupon the said justices, or the major part of them, if they shall find that the claimant has sustained any damage by means of any such offence, shall make an order for payment of the amount of such damage to him, together with his reasonable costs and charges, and also an order for payment of the costs and charges (if any) of the high constable or inhabitants, and shall direct such order or orders to the treasurer of the county, riding, or division in which such hundred or district shall be situate, who shall pay the same to the party or parties therein named, and shall be reimbursed for the same in the manner hereinbefore directed.

Sect. 10. If any high constable shall refuse or neglect to exhibit or give such notice as is required in any of the cases aforesaid, it shall be lawful for the party damnified to sue him for the amount of the damage sustained, such amount to be recovered by an action on the case, together with full costs of suit.

Sect. 11. Every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in this act mentioned, shall be brought in the name of the rector,

Liability of.

7 & 8 Geo. 4, c. 31.

Such cases to be settled by justices at a special petty session.

Penalty on high constable for neglect.

Proceeding in case of damage to a church or chapel.

(a) To ground a proceeding at petty sessions under this section, the party or his servant must go before a justice within seven days after the offence committed, and submit to examination, &c., according to sect. 3 of the act, as well as where an action is to be brought. And the Court will

not grant a mandamus to the justices to summon such petty session, where it does not appear by affidavit that these steps have been taken; though the party swear that he has duly served the notice required by sect. 8. (*R. v. Justices of Folkstone*, 4 B. & A. 552.)

Liability of.

7 & 8 Geo. 4, c. 31.

In case of damage to property belonging to a corporation.

Where the damage is committed in any county of a city, &c., or in any liberty, &c., which is not within any hundred, or does not contribute to county rate, such county, liberty, &c., shall be liable like the hundred.

Provision for executing writs in certain places.

vicar, or curate of such church or chapel; or in case there be no rector, vicar, or curate, then in the names of the church or chapel-wardens, if there be any such, and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred or other like district, in the same manner, and subject to the same conditions, as any person damnified is by this act enabled to do: provided always, that the several conditions which are hereinbefore required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

Sect. 12. And whereas the offences for which compensation is granted by virtue of this act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto, but not as being part of any hundred or other like district; and it is expedient to provide for all such cases; it is therefore enacted, that where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects, as the inhabitants of the hundred; and every thing in this act in any wise relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town, or place, in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised and performed by the justices of the peace of such county of a city or town; and in every action to be brought, or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town, or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorised or required to do in either of such cases, shall be done by the peace officer so served, who shall have the same powers, rights, and remedies as such high constable has by virtue of this act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act until the termination of all proceedings in and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead. See *Birley v. Salford*, (*Inhabitants of*), *ante*, p. 1370.

Sect. 13. And for securing the due execution of writs in the Cinque Ports, and in places where writs are directed to other officers than the sheriff, and in liberties where the sheriff is not warranted in executing writs, it is enacted, that all other such officers to whom any writ of execution under this act shall be directed, by whatsoever name they shall be known, shall have the same power of granting a warrant for payment of the sum by such writ directed to be levied as is hereby given to the sheriff in case of a writ of execution directed to him; and

that every sheriff and other such officer as aforesaid shall have authority to grant his warrant under this act, notwithstanding the offence shall have been committed in, or the treasurer or other person to whom such warrant shall be directed shall reside or be in, any liberty where the sheriff or officer is not warranted in executing writs.

Sect. 14. And as to the mode of payment and reimbursement under this act in such liberties, franchises, cities, towns, and places as contribute to the payment of the county rate, but not as being part of any hundred, be it enacted, That the warrant of the sheriff or other officer upon any writ of execution against the inhabitants of any such liberty, franchise, city, town, or place, and every order of justices for payment to the party damnified therein, or to the peace officer or inhabitants thereof, by virtue of this act, shall be directed to the treasurer of the county, riding, or division in which such liberty, franchise, city, town, or place shall be situate, who is hereby required to pay the same; and the justices of the peace of such county, riding, or division, at their next general or quarter sessions of the peace, or any adjournment thereof, shall direct such sum or sums of money as shall have been so paid or ordered to be paid by the treasurer, to be raised on such liberty, franchise, city, town, or place, over and above the general rate to be paid by the same in common with the rest of the county, riding, or division, under the acts relating to county rates; and such sum or sums shall be raised in the manner directed by those acts, and shall be forthwith paid over to the treasurer.

Sect. 15. And as to the mode of payment and reimbursement under this act in counties of cities and towns, and in such liberties, franchises, cities, towns, and places as do not contribute to the payment of the general county rate; be it enacted, that all sums of money payable either by virtue of any warrant of the sheriff or other officer, or of any order or orders arising out of any action or summary claim against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, shall be paid out of the rate (if any) in the nature of a county rate, or out of any fund applicable to similar purposes, where there is such a rate or fund therein, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such county, liberty, franchise, city, town, or place, the same shall be paid out of the rate or fund for the relief of the poor of the particular parish, township, district, or precinct therein, where the offence was committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund; and in every such case the warrant and orders shall be directed and delivered to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require.

The 2 & 3 Will. 4, c. 72, enacts, that if any threshing machine, whether fixed or moveable, or any part thereof, shall be feloniously cut, broken, damaged, or destroyed by any persons riotously, and tumultuously assembled together, then and in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, or by whatever name it shall be denominated, in which any such offence shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any such machines as aforesaid, but also for any damage which may at the same time be done by any such offenders to any erection or fixture whatever in or about or belonging to any such machines.

Sect. 2. The several clauses, remedies, and provisions contained in the said recited act shall extend and be construed to extend to such machines as are hereinbefore mentioned, as fully and effectually, to all intents and purposes, as if the same machines had been mentioned and particularised in the said recited act.

Liability of.

7 & 8 Geo. 4, c. 31.

Mode of reimbursement in liberties, cities, and towns, not within any hundred, but contributing to the county rate.

Mode of reimbursement in counties of cities and in liberties, cities, and towns, not contributing to any county rate.

2 & 3 Will. 4, c. 72, extends provisions of 7 & 8 Geo. 4, c. 31, to threshing machines.

Forms.

17 & 18 Vict. c. 104.

By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 477, in the case of any wrecked ship being plundered by a tumultuous assemblage, the hundred is made responsible for the damage.

Forms.

(1.) Notice to high constable of hundred or other like district, or to the peace officer of a county of a city or town, or of a liberty, franchise, city, town, or place (a).

To the high constable [or, "to _____, one of the high constables"] of &c., [or, "to _____, a peace officer of &c."]

I hereby give you notice, That I intend to claim compensation from the inhabitants of [here specify the hundred or other like district, or county of a city, &c., or liberty, franchise, &c., as the case may be], on account of the damage which I have sustained by means of [here state the offence, the time and place where it was committed, and the nature and amount of the damage]; and I hereby require you, within seven days after your receipt of this notice to exhibit the same to some two justices of the peace of the county, ["riding," or, "division"] of _____, residing in, or acting for the said hundred, &c., [or if in a liberty, franchise, &c., where the justices, of the county, riding, or division, have no jurisdiction; then say, "to some two justices of the peace of," naming the liberty, franchise, &c.], [or if in a county of a city, &c., then say, "to some two justices of the peace of," naming the county of the city, &c.], in order that they may appoint a time and place for holding a special petty sessions, to hear and determine my claim for compensation by virtue of an act passed in the seventh and eighth years of the reign of King George the Fourth, intituled An Act for consolidating and amending the laws in England relative to remedies against the hundred; and you are required to give me notice of the day, hour, and place appointed for holding such petty sessions, within three days after the justices shall have appointed the same. Given under my hand, this _____ day of _____, in the year of our Lord _____.

(Signed)

A. B.

(2.) Notice to be placed on the church or chapel door, or other conspicuous part of the parish, township, or place (a).

I hereby give notice, That I shall apply for compensation to the justices of the peace, at a special petty sessions to be holden at _____, on the _____ day of _____ next, at the hour of _____ in the forenoon, on account of the damage which I have sustained by means of [here state the offence, the time and place where it was committed, and the nature and amount of the damage, in the same manner as in the preceding form]. Given under my hand, this _____ day of _____, in the year of our Lord _____.

(Signed)

A. B.

(a) This form is given by the 7 & 8 Geo. 4, c. 31.

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